Supreme Court, U.S.
FILED
98 559 OCT 1 - 1998
OFFICE OF THE CLERK

No. .

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FRANKLIN AUSTIN,

Petitioner

v.

CYNTHIA LEE DAWSON-AUSTIN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD R. ORSINGER
Counsel of Record

ATTORNEY AT LAW
1616 Tower Life Building
San Antonio, Texas 78205
Telephone: (210) 225-5567
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Attorney for Petitioner

269 pp

APPENDIX

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NO. 92-14835

In the Matter of the Marriage of **William Franklin Austin** **and** **Cynthia Lee Dawson-Austin**	**In the District Court of Dallas County, Texas 301st Judicial District**

FINAL DECREE OF DIVORCE

On July 1, 1993, this case came on for trial in open court before this the 301st Judicial District Court in and for Dallas County, Texas.

On August 31, 1993 both parties rested and on September 2, 1993 the Court heard argument of counsel.

Petitioner, WILLIAM FRANKLIN AUSTIN, Social Security number 542-46-5854, appeared in person and through his attorneys of record, M.J. "Ike" Vanden Eykel of Koons, Fuller & Vanden Eykel and Harry L. Tindall of Tindall & Foster, P.C.

Respondent, CYNTHIA LEE DAWSON-AUSTIN, Social Security number 543-50-1164, appeared in person and through her attorneys of record Kenneth G. Raggio, Charles Wilson and Tom O'Brien of Raggio & Raggio, Inc., Toby Goodman of Goodman & Clark, P.C., and Michael Aronson. Robert Smith, a member of the California Bar appeared pro hac vice.

The record of testimony was duly reported by Evelyn Talada, 301st Judicial District Court Reporter, Dallas County, Texas.

The Court finds that the pleadings of Petitioner are in due form and contain all the material allegations, information, and prerequisites required by law. The Court, after receiving

evidence, finds that it has jurisdiction over this cause of action and the parties and that at least 60 days have elapsed since the date the suit was filed. The Court finds Petitioner was and has been a domiciliary of this state for at least a six-month period preceding the filing of this action and a resident of the county in which this suit is filed for at least a 90-day period preceding the filing of this action.

A jury was waived, and all questions of fact and of law were submitted to the Court.

The parties stipulated that William Franklin Austin and Cynthia Lee Dawson-Austin were married on August 23, 1980. The Court accepts the stipulation.

IT IS ORDERED AND DECREED that WILLIAM FRANKLIN AUSTIN, Petitioner, and CYNTHIA LEE DAWSON-AUSTIN, Respondent, are divorced and that the marriage between them is dissolved on the ground of insupportability.

The Court finds there were no children born or adopted of the marriage and that none were expected.

IT IS ORDERED, ADJUDGED AND DECREED that the estate of the parties be and is hereby divided as follows:

Petitioner, WILLIAM FRANKLIN AUSTIN, is awarded as his sole and separate property all the property listed on Schedule "A" attached hereto. Respondent, CYNTHIA LEE DAWSON-AUSTIN, is divested of any right, title, interest or claim in the property listed on Schedule "A" and title to such property is hereby vested in Petitioner, WILLIAM FRANKLIN AUSTIN.

Respondent, CYNTHIA LEE DAWSON-AUSTIN, is awarded as her sole and separate property all the property listed on Schedule "B" attached hereto. Petitioner, WILLIAM FRANKLIN AUSTIN, is divested of any right, title,

interest or claim in the property listed on Schedule "B" and title to such property is hereby vested in Respondent, CYNTHIA LEE DAWSON-AUSTIN.

The Court orders that any unsecured debt shall be the obligation of the party incurring same unless specific provision is made herein to the contrary. The award of property which secures an indebtedness includes the assignment of the underlying debt to the spouse receiving the property. The spouse receiving such property will indemnify and hold the other spouse and their property harmless from any and all liability on such underlying indebtedness.

IT IS ORDERED AND DECREED that WILLIAM FRANKLIN AUSTIN timely pay and hold CYNTHIA LEE DAWSON-AUSTIN and her property harmless from the following community liabilities:

(1) NorthPark National Bank — $720,000.00; and

(2) Norwest National Bank — $250,000.00.

IT IS ORDERED AND DECREED and the Court so finds that, 100% ownership interest in Starkey Laboratories, Inc. was and has been at all times the separate property of WILLIAM FRANKLIN AUSTIN.

IT IS ORDERED that WILLIAM FRANKLIN AUSTIN pay to RAGGIO & RAGGIO, INC. the sum of $400,000.00 for attorneys for CYNTHIA LEE DAWSON-AUSTIN. The Court finds that payment of said fees was made in open Court on the 28th day of September, 1993.

IT IS ORDERED AND DECREED that CYNTHIA LEE DAWSON-AUSTIN shall appear in the 301st Judicial District Court, Dallas County, Texas at 9:00 p.m. on the 15 day of September, 1993, and execute, have acknowledged, and deliver to WILLIAM FRANKLIN AUSTIN the following documents or appropriate situs state equivalents:

(1) [Special Warranty] Deeds in the forms attached to the Decree of Divorce as Exhibits B, C, D, and E for the following property:

[6650 Vernon Ave. South, Edina, Minnesota, Units No. 219, 319, 406 and 419;

(2) [Special Warranty] Deeds in the forms attached to the Decree of Divorce as Exhibits F, G, H, I, and J for the following property:

6670 Vernon Ave. South, Edina, Minnesota, Units 109, 119, 209, 409 and 419;

(3) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit K for the following property:

6730 Vernon Ave. South, Edina, Minnesota, Unit 219;

(4) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit L for the following property:

230 Birch Bluff, Tonka Bay, Minnesota;

Lots 25, 26, and 27, "Wilcox Old Orchard Addition, Hennepin County, Minnesota.

(5) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit M for the following property:

5321 Beachside, Minnetonka, Minnesota;

Lot 17, Block 3, Beachside.

(6) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit N for the following property:

706 Chandler Ave., Glencoe, Minnesota;

Lot 6 and 7, Block 69 in the town of Franklin in McLeod County, Minnesota.

(7) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit O for the following property:

601 Kings Croft, Cherry Hill, New Jersey;

Unit No. 601, lying and being in the Township of Cherry Hill, County of Camden and State of New Jersey.

(8) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit P for the following property:

2915 East 10th Street, Glencoe, Minnesota;

That part of the West Half of the West Half of the Northeast Quarter of Section 18, Township 115, Range 27, McLeod County, Minnesota.

(9) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit Q for the following property:

9505 Hamilton Ave., Eden Prairie, Minnesota;

Lot 7 and That part of Lot 7, lying Easterly of a line described as beginning at the Southeast corner of Lot 7, thence Northerly at right angles to the South line of said Lot 7 to its intersection with the Northerly line of said Lot 7 and there terminating;

All in Block 1, Claradon Park, according to the plat thereof on file or of record in the office of the Registrar of Titles in and for said county.

(10) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit R for the following property:

2255 Northeast 194th Ave., Portland, Oregon;

Lot 5, except southerly 549 feet thereof, San Rafael Industrial District.

(11) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit S for the following property:

6701 Field Way, Edina, Minnesota;

Lot 2, Block 3, Parkwood Knolls, 19th Addition.

(12) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit T for the following property:

205 Ellen, Nixa, Missouri;

Section 13, Township 27, Range 22, All SE ¼ NW ¼ SE ¼, also described as Lots 1600 and 1603 City (Village) of Nixa and Vac. St. lying.

(13) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit U for the following property:

208 Poplar, Nixa, Missouri;

Section 14, TWp 27, Rg 22; Lot 6, Hedgpeth Estates.

(14) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit V for the following property:

5334 Harbor Town, Dallas, Texas:

Lot 13, Block 1/8756 of Bent Tree North, an addition to the City of Dallas, Collin County, Texas, according to the plat thereof, recorded in Volume B, Page 138, Map Records, Collin County, Texas. Certificate of Correction filed November 20, 1978, recorded in Volume 1144, Page 789, Deed Records, Collin County, Texas and filed in Dallas County in Volume 78053, Page 1968, Deed Records, Dallas County, Texas.

IT IS ORDERED AND DECREED that WILLIAM FRANKLIN AUSTIN shall appear in the 301st Judicial District Court, Dallas County, Texas at 2:00 p.m. on the 15th day of October, 1993, and execute, have acknowledged, and deliver to CYNTHIA LEE DAWSON-AUSTIN the following documents or appropriate situs state equivalents:

(1) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit W for the following property:

Street Address: 70661 Oroville Circle, Rancho Mirage, California.

Parcel 4 of Parcel Map 5950, in the City of Mirage, County of Riverside, State of California, as per map recorded in Book 16, Page 53, of Parcel Maps, in the Office of the County Recorder of said County.

(2) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit X for the following property:

Street Address: 8 Birchfield Drive, Mt. Laurel, New Jersey.

KNOWN AND DESIGNATED as Lot 8, Block 404 on "Plan of Phase One, Section 1 and 2 of Birchfield", said map filed in the Burlington County Clerk's Office on May 14, 1973, as Map No. 01709.

ALSO being known as lot 8, Block 404 on the Tax Map of the Township of Mount Laurel, Burlington County, New Jersey.

BEING the same premises conveyed to the Grantors herein by Deed of Peter H. Strauss which Deed is dated December 21, 1984 and recorded in the Burlington County Clerk Office on January 5, 195 in book 2948 of Deed for said County, on Page 131.

(3) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit Y for the following property:

Street Address: 6120 Pine Street, Florence, Oregon.

Section 16, Township 17, Range 12, Tax Lot Number 02800.

(4) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit Z for the following property:

Section 27, T 13 S, R 10 W, County of Lincoln, as platted and recorded in Book 38,

Page 1376, Lincoln County Deed Records, in Lincoln County, Oregon.

(5) [Special Warranty] Deed in the form attached to the Decree of Divorce as Exhibit AA for the following property:

Street Address: 5555 Collins Ave., Miami, Florida.

Unit No. Ph-D, of OCEANSIDE PLAZA CONDOMINIUM, according to the Declaration of Condominium thereof, recorded July 24, 1978 in Office Records Book 10102 at Page 365 of the Public Records of Dade County, Florida, and amendments thereto, together with all appurtenances thereto, including an undivided interest in the common elements of said condominium as set forth in said Declaration and amendments.

IT IS ORDERED AND DECREED that all relief requested in this cause and not expressly granted is denied.

Signed on the 28 day of September, 1993.

/s/ BOB O'DONNELL

BOB O'DONNELL, Judge Presiding
301st Judicial District Court
Dallas County, Texas

APPROVED AS TO FORM:

TINDALL & FOSTER, P.C.

By: _____

Harry L. Tindall
Texas Bar Card: 20053000
2800 Texas Commerce Tower
Houston, Texas 77002-3094
Telephone No. (713) 229-8733
Fax No. (713) 228-1303

KOONS, FULLER & VANDEN EYKEL, P.C.

By: _____

Kenneth D. Fuller
Texas Bar Card: 07521000
M.J. "Ike" Vanden Eykel
Texas Bar Card:
2311 Cedar Springs Rd., Suite 300
Dallas, Texas 75201
Telephone No. (214) 871-2727
Fax No. (214) 871-0196

ATTORNEYS FOR PETITIONER
WILLIAM FRANKLIN AUSTIN

RAGGIO & RAGGIO, INC.

By: _____

Kenneth G. Raggio
Texas Bar Card: 16467500
3316 Oak Grove Avenue, Suite 100
Dallas, Texas 75204
Telephone No. (214) 880-7500
Fax No. (214) 880-7506

SCHEDULE A

PROPERTY AWARDED TO PETITIONER, WILLIAM FRANKLIN AUSTIN

1. Real property and improvements located thereon, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, warranties and service contracts, and title and closing documents, more particularly described as:
   a) 6650 Vernon Ave. South, Edina, Minnesota, Units No. 219, 319, 406 and 419;
   b) 6670 Vernon Ave. South, Edina, Minnesota, Units 109, 119, 209, 409 and 419;
   c) 6730 Vernon Ave. South, Edina, Minnesota, Unit 219;
   d) 230 Birch Bluff, Tonka Bay, Minnesota;
   e) 5321 Beachside, Minnetonka, Minnesota;
   f) 706 Chandler Ave., Glencoe, Minnesota;
   g) 601 Kings Croft, Cherry Hill, New Jersey;
   h) 2915 East 10th Street, Glencoe, Minnesota;
   i) 9505 Hamilton Ave., Eden Prairie, Minnesota;
   j) 2255 Northeast 194th Ave., Portland, Oregon;
   k) 6701 Field Way, Edina, Minnesota;
   l) 205 Ellen, Nixa, Missouri;
   m) 208 Poplar, Nixa, Missouri;
   n) 5334 Harbor Town, Dallas, Texas:
2. All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the control of Petitioner, WILLIAM FRANKLIN AUSTIN.

3. ½ of the artwork and collections of WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN.

4. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner, WILLIAM FRANKLIN AUSTIN.

5. Any and all sums of cash on deposit in Compass Bank, Dallas, Texas, Account #73124328; and NorthPark National, Dallas, Texas, Account #5091426.

6. The following life insurance policies insuring the life of WILLIAM FRANKLIN AUSTIN, together with any and all cash surrender value associated therewith and any and all contingent beneficial interest:

   a) Summit National Life Policy Number SN8904954U;

   b) John Hancock Life Policy Number 66808477; and

   c) John Hancock Life Policy Number 66858202.

7. 66.68% of the Starkey Employees Savings and Retirement Plan, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to the Starkey Employees Savings and Retirement Plan existing by reason of WILLIAM FRANKLIN AUSTIN'S past employment with Starkey Laboratories, Inc.

8. The Willowbend Polo & Hunt Club membership.

SCHEDULE B

PROPERTY AWARDED TO RESPONDENT, CYNTHIA LEE DAWSON-AUSTIN

1. Real property and improvements located thereon, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, warranties and service contracts, and title and closing documents, more particularly described as:

   a) 70661 Oroville Circle, Rancho Mirage, California;

   b) 8 Birchfield Drive, Mt. Laurel, New Jersey;

   c) 6120 Pine Street, Florence, Oregon;

   d) Parcel 16.00, Section 27, T13S, R10W, Lincoln County, Oregon; and

   e) 5555 Collins Ave., Miami, Florida.

2. All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the control of Respondent, CYNTHIA LEE DAWSON-AUSTIN.

3. 1/2 of the artwork and collections of WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN.

4. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Respondent, CYNTHIA LEE DAWSON-AUSTIN.

5. Any and all sums of cash on deposit in Norwest Bank, Minneapolis, Account #2735777; and Citizen State Bank Account #632083.

6. The following life insurance policies insuring the life of CYNTHIA LEE DAWSON-AUSTIN, together with

any and all cash surrender value associated therewith and any and all contingent beneficial interest:

a) Summit National Life Policy Number SN8904953U.

7. The 1979 Mercedes motor vehicle, vehicle identification number 116003612006392, together with all prepaid insurance, keys, and title documents.

8. The 1975 Westlake mobile home, together with all prepaid insurance, keys, and title documents.

9. 33.32% of the Starkey Employees Savings and Retirement Plan, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to the Starkey Employees Savings and Retirement Plan existing by reason of WILLIAM FRANKLIN AUSTIN'S past employment with Starkey Laboratories, Inc., accordance with a Qualified Domestic Relations Order to be signed on the same day as this Final Decree of Divorce.

10. Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses or other benefit program existing by reason of CYNTHIA LEE DAWSON-AUSTIN'S past, present and future employment.

11. The Thunderbird Club membership.

OREGON STATUTORY BARGAIN AND SALE DEED

CYNTHIA DAWSON AUSTIN, Grantor, conveys to WILLIAM AUSTIN, Grantee, the following described real property situated in Multnomah County, Oregon, to-wit:

Lot 5, except the southerly 549 feet thereof, San Rafael Industrial District.

The true consideration for this conveyance is compliance with Decree of Dissolution of Marriage.

Until a change is requested, all tax statements are to be sent to the following address:

William F. Austin
5334 Harbor Town
Dallas, Texas 75287

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

DATED this day of , 1993.

_____
Cynthia Dawson Austin

STATE OF _____ }
} ss.
County of _____ }

The foregoing instrument was acknowledged before me this day of , 1993, by Cynthia Dawson Austin,

who personally appeared and is personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged that she executed it.

Witness my hand and official seal.

_____

Notary Public for _____

My Commission Expires: _____

AFTER RECORDING, RETURN TO:
Ike Vanden Eykel, Esq.
Koons, Fuller & Vanden Eykel
2311 Cedar Springs, Suite 300
Dallas, Texas 75201

EXHIBIT Y

This Instrument Prepared by: MILLER AND SCHWARTZ, P.A.

Address: 4040 Sheridan Street, Post Office Box 7259 Hollywood, Florida 33081-1259

Robert M. Schwartz, Esq.

Property Appraisers Parcel Identification (Folio) Number(s): 3214-010-2990

Grantee(s) S.S. #(s): 543-50-1164

THIS SPECIAL WARRANTY DEED *Made the day of A.D. 1993 by WILLIAM AUSTIN and CINDY DAWSON-AUSTIN, his wife hereinafter called the grantor, to CINDY DAWSON-AUSTIN whose post office address is 70661 Oroville Circle, Rancho Mirage, California 92270 hereinafter called the grantee:*

(Wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals, and the successors and assigns of corporations.)

WITNESSETH: *That the grantor, for and in consideration of the sum of $10.00******* and other valuable considerations, receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys and confirms unto the grantee all that certain land situate in Dade County, State of Florida, viz:*

Unit No. Ph-D, of OCEANSIDE PLAZA CONDOMINIUM, according to the Declaration of Condominium thereof, recorded July 24, 1978, in Official Records Book 10102 at Page 365 of the Public Records of Dade County, Florida, and amendments thereto, together with all appurtenances thereto, including an undivided interest in the common elements of said condominium as set

forth in said Declaration and amendments. a/k/a 5555 Collins Avenue, Ph-D, Miami Beach, Florida 33140.

TOGETHER, *with all the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.*

TO HAVE AND TO HOLD, *the same in fee simple forever.*

AND *the grantor hereby covenants with said grantee that the grantor is lawfully seized of said land in fee simple; that the grantor has good right and lawful authority to sell and convey said land, and hereby warrants the title to said land and will defend the same against the lawful claims of all persons claiming by, through or under the said grantor.*

IN WITNESS WHEREOF, *the said grantor has hereunto set their hands and seals the day and year first above written.*

Signed, sealed and delivered in the presence of:

_____	_____ L.S.
Witness Signature (as to Grantor)	Grantor Signature
_____	WILLIAM AUSTIN
Printed Name	Printed Name
	5334 Harbor Town
_____	Dallas, Texas 75287
Witness Signature (as to Grantor)	Post Office Address
_____	
Printed Name	

_____	_____ L.S.
Witness Signature (as to Co-Grantor, if any)	Co-Grantor Signature, if any
_____	CINDY DAWSON-AUSTIN
Printed Signature	Printed Signature
	70661 Oroville Circle Rancho Mirage, California 92270
_____	
Witness Signature (as to Co-Grantor, if any)	Post Office Address
_____	
Printed Name	

STATE OF _____

COUNTY OF _____

I hereby Certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared

CINDY DAWSON-AUSTIN

known to me to be the person described in and who executed the foregoing instrument, who acknowledged before me that she executed the same, that I relied upon the following form of identification of the above-named person and that an oath (was)(was not) taken.

_____

NOTARY RUBBER STAMP SEAL

Witness my hand and official seal in the County and State last aforesaid this _____ day of _____, A.D. 19___

_____

Notary Signature

_____

Printed Notary Signature

EXHIBIT AA

SPECIAL
WARRANTY DEED

TO

STATE OF _____
COUNTY OF _____

I hereby certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgements, personally appeared WILLIAM AUSTIN, known to me to be the person described in and who executed the foregoing instrument, who acknowledged before me that he executed the same, that I relied upon the following form of identification of the above-named person: and that an oath (was) (was not) taken.

Witness my hand and official seal in the County and State last aforesaid this day of , 1993.

_____
Notary Signature

_____
Printed Notary Signature

QUIT-CLAIM DEED

THIS INDENTURE, Made on the day of September A.D., One Thousand Nine Hundred and Ninety-Three by and between CYNTHIA D. AUSTIN, a single person of the County of Riverside, State of California party of the first part, and WILLIAM F. AUSTIN, a single person of the County of Dallas, State of Texas party of the second part, (Mailing address of said first named grantee is 5334 Harbor Town, Dallas, Texas 75287).

WITNESSETH, that the said party of the first part, in consideration of the sum of other good and valuable consideration and Ten DOLLARS, to be paid by the said party of the second part (the receipt of which is hereby acknowledged) does by these presents REMISE, RELEASE and FOREVER QUIT CLAIM unto the said party of the second part, the following described lots, tracts or parcels of land, lying, being and situate in the County of Christian and State of Missouri, to-wit:

All of Lot No. Six (6) of HEDGPETH ESTATES, a subdivision in Nixa, Christian County, Missouri.

Subject to easements, reservations, and restrictions of record, taxes and assessments, general and special, not now due and payable.

This Deed is delivered pursuant to a Decree of Dissolution of Marriage entered by the Circuit Court of Dallas County, Texas in case number 92-14835-T.

TO HAVE AND TO HOLD THE SAME, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said party of the second part and unto his heirs and assigns forever; so that neither the said party of the first part nor her heirs nor any other person or persons, for her or in her name or behalf, shall or will hereinafter claim or

demand any right or title to the aforesaid premises or any part thereof, but they and each of them shall, by these presents, be excluded and forever barred.

IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year above written.

_____ *(Seal)*
CYNTHIA D. AUSTIN

Signed, Sealed and Delivered in the Presence of

_____ *(Seal)*

_____ _____ *(Seal)*

_____ _____ *(Seal)*

EXHIBIT T

TEXAS ACKNOWLEDGMENT — UNMARRIED PERSON

STATE OF TEXAS
} ss.
COUNTY OF _____

On this day of September, 1993 before me, the undersigned a Notary Public, personally appeared CYNTHIA D. AUSTIN to me known to be the person described in and who executed the foregoing instrument, and acknowledges that she executed the same as her free act and deed. And the said CYNTHIA D. AUSTIN further declared herself to be single and unmarried.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the day and year last above written.

_____

Notary Public in and for said County and State.

My term expires _____, 19____

MISSOURI ACKNOWLEDGMENT — MAN AND WIFE

STATE OF _____ }
COUNTY OF _____ } ss.

On this day of , 19 before me, a Notary Public, personally appeared and his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the day and year last above written.

_____

Notary Public in and for said County and State.

My term expires _____, 19____

QUIT-CLAIM DEED

FROM

CYNTHIA D. AUSTIN, a single person

TO

WILLIAM F. AUSTIN, a single person

Filed for record this day of A.D., 19 at o'clock, minutes, M. Recorded in Book at Page .

_____

Recorder.

By _____

Deputy.,

Recorder's Fee, $.

This Document Prepared By
Paden, Welch, Martin & Albano, P.C.
311 West Kansas
Independence, MO 64050

STATE OF _____ }
COUNTY OF _____ } ss.

IN THE RECORDER'S OFFICE

I, , Recorder of said County, do hereby certify that the within instrument of writing was, at o'clock and minutes M., on the day of A.D., 19 , duly filed for record in my office, and is recorded in the records of this office, in book , at page .

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at this day of AD, 19 .

_____ *RECORDER*

_____

DEED

CINDY DAWSON-AUSTIN

Grantor.

TO

WILLIAM F. AUSTIN

Grantee.

Dated: , *1993*

Record and return to:

Attention: Ike Vanden Eykel, Esq.
Koons, Fuller & Vanden Eykel
2311 Cedar Springs
Suite 300
Dallas, Texas 75201

STATE OF NEW JERSEY
AFFIDAVIT OF CONSIDERATION OR EXEMPTION
(c. 49, P.L. 1968)
or
PARTIAL EXEMPTION
(c. 176, P.L. 1975)

To Be Recorded With Deed Pursuant to c. 49, P.L. 1968, as amended by c. 225, P.L. 1985 (N.J.S.A. 46:15-5 et seq.)

STATE OF
COUNTY OF _____ } ss.

FOR RECORDER'S USE ONLY
Consideration $ _____
Realty Transfer Fee $ _____ *
Date _____ By _____

* Use symbol "C" to indicate that fee is exclusively for county use.

(1) PARTY OR LEGAL REPRESENTATIVE (See Instructions #3, 4 and 5 on reverse side)

Deponent, (Name) CINDY DAWSON-AUSTIN, being duly sworn according to law upon his/her oath deposes and says that he/she is the (State whether Grantor, Grantee, Legal Representative, Corporate Officer, Officer of Title Co. Lending Institution, etc.) Grantor in a deed dated , 1993, transferring real property identified as Block No. 1404 Lot No. 8 located at (Street Address, Municipality, County) 8 Birchfield Drive East, Township of Mount Laurel, Burlington County, New Jersey and annexed hereto.

(2) CONSIDERATION (See Instruction #6)

Deponent states that, with respect to deed hereto annexed, the actual amount of money and the monetary value

of any other thing of value constituting the entire compensation paid or to be paid for the transfer of title to the lands, tenements or other realty, including the remaining amount of any prior mortgage to which the transfer is subject or which is to be assumed and agreed to be paid by the grantee and any other lien or encumbrance thereon not paid, satisfied or removed in connection with the transfer of title is $ None.

(3) FULL EXEMPTION FROM FEE Deponent claims that this deed transaction is fully exempt from the Realty Transfer Fee imposed by c. 49, P.L. 1968, for the following reason(s): Explain in detail. (See Instruction #7.) Mere reference to exemption symbol is not sufficient.

(p) Recorded within 90 days following the entry of a divorce decree which dissolves the marriage between the grantor and grantee

(4) PARTIAL EXEMPTION FROM FEE *NOTE: All boxes below apply to grantor(s) only. ALL BOXES IN APPROPRIATE CATEGORY MUST BE CHECKED. Failure to do so will void claim for partial exemption. (See Instructions #8 and #9)*

Deponent claims that this deed transaction is exempt from the increased portion of the Realty Transfer Fee imposed by c. 176, P.L. 1975 for the following reasons:

a) **SENIOR CITIZEN** (See Instruction #8)

- ☐ Grantor(s) 62 yrs. of age or over.*
- ☐ One or two-family residential premises.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ No joint owners other than spouse or other qualified exempt owners.

b) **BLIND** (See Instruction #8)

- ☐ Grantor(s) legally blind.*
- ☐ One or two-family residential premises.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ No joint owners other than spouse or other qualified exempt owners.

DISABLED (See Instruction #8)

- ☐ Grantor(s) permanently and totally disabled.*
- ☐ One or two-family residential premises.
- ☐ Receiving disability payments.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ Not gainfully employed.
- ☐ No joint owners other than spouse or other qualified exempt owners.

* IN THE CASE OF HUSBAND AND WIFE, ONLY ONE GRANTOR NEED QUALIFY.

---

c) **LOW AND MODERATE INCOME HOUSING** (See Instruction #8)

- ☐ Affordable According to H.U.D. Standards.
- ☐ Meets Income Requirements of Region.
- ☐ Reserved for Occupancy.
- ☐ Subject to Resale Controls.

---

d) **NEW CONSTRUCTION** (See Instruction #9)

- ☐ Entirely new improvement.
- ☐ Not previously used for any purpose.
- ☐ Not previously occupied.

Deponent makes this Affidavit to induce the County Clerk or Register of Deeds to record the deed and accept the fee submitted herewith in accordance with the provisions of c. 49, P.L. 1968.

Subscribed and Sworn to before me this [ILLEGIBLE].

IMPORTANT — BEFORE COMPLETING THIS AFFIDAVIT, PLEASE READ THE INSTRUCTIONS ON THE REVERSE SIDE HEREOF.

This form is prescribed by the Director, Division of Taxation in the Department of the Treasury, as required by law, and may not be altered or amended without the approval of the Director.

ORIGINAL — White copy to be retained by County.

DUPLICATE — Yellow copy to be forwarded by County to Division of Taxation on partial exemption from fee (N.J.A.C. 18:16 — 8.12).

TRIPLICATE — Pink copy is your file copy.

WHITE AND YELLOW COPIES MUST BE SUBMITTED WITH DEED TO COUNTY RECORDING OFFICER

EXHIBIT X

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, aka Cindy Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

> Units Nos. RD 406 and GD 62, Condominium No. 496, Fountain Woods II, a Condominium located in the County of Hennepin. Pursuant to the Declaration Document No. 1604642 and the by-laws Document No. 1604643.
>
> Subject to restrictions, reservations and easements of record, if any.
>
> The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT D

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

_____

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Units Nos. RA319 and GA37, Condominium No. 287, Fountain Woods, a Condominium located in the County of Hennepin; pursuant to the Declaration Document No. 1566985 and the Bylaws Document No. 1566986;

Subject to the provisions, restrictions, obligations and easements as set forth in said Declaration Document No. 1566985 and Bylaws Document No. 1566986;

Subject to easements for ingress, egress, utility and use of swimming pool and tennis court and uses related thereto for the benefit of the North 426.50 feet of Outlot C, Walnut Ridge Third Addition and together with easements for utility purposes over the North 426.50 feet of said Outlot C for the benefit of the land in said Condominium No. 287, all as created in

Declaration of Easements Document No. 1550710. Files of the Registrar of Titles; (See Inst).

Subject to the provisions of Minnesota Uniform Condominium Act, Minnesota Statutes 1980, Chapter 515A and Acts Amendatory thereof.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____
Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT C

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

_____

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Unit Nos. RA219 and GA22. Condominium No. 287, Fountain Woods, a Condominium located in the County of Hennepin; pursuant to the Declaration Document No. 1566985 and the Bylaws Document No. 1566986.

Subject to the provisions, restrictions, obligations and easements as set forth in said Declaration Document No. 1566985 and Bylaws Document No. 1566986;

Subject to easements for ingress, egress, utility and use of swimming pool and tennis court and uses related thereto for the benefit of the North 426.50 feet of Outlot C, Walnut Ridge Third Addition and together with easements for utility purposes over the North 426.50 feet of said Outlot C for the benefit of the land in said Condominium No. 287, all as created in

Declaration of Easements Document No. 1550710. Files of the Registrar of Titles; (See Inst).

Subject to the provisions of Minnesota Uniform Condominium Act, Minnesota Statutes 1980, Chapter 515A and Acts Amendatory thereof.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____
Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT B

SCHEDULE A

KNOWN AND DESIGNATED as Lot 8, Block 404 on "Plan of Phase One, Section 1 and 2 of Birchfield", said map filed in the Burlington County Clerk's Office on May 14, 1973, as map No. 01709.

BEING further described as follows in accordance with a survey made by Robins Associates, dated June 24, 1985:

BEGINNING at a point between Lots 8 and 9 a party wall as noted on Plan of Birchfield Sections 1 and 2, Map 01709; thence

(1) South 52 degrees 01 minutes 15 seconds West, a distance of 27.02 feet to a point between Lots 9 and an open space; thence

(2) South 35 degrees 40 minutes 00 seconds East, a distance of 93.01 to a point; thence

(3) North 54 degrees 20 minutes 00 seconds East, a distance of 27.00 feet to a point between Lots 8 and 9; thence

(4) North 35 degrees 40 minutes 00 seconds West a distance of 91.92 feet to the point and place of BEGINNING.

ALSO BEING known as 8 Birchfield Drive East, Mount Laurel, New Jersey.

BEING the same premises conveyed to William F. Austin and Cindy Dawson-Austin, his wife, by deed dated July 24, 1985 from Rafael Ortega-Maggi and Lottie H. Ortega-Maggi, his wife, which was recorded in the Office of the Clerk of Burlington County on July 31, 1985 in Deed Book 3042, Page 258.

GRANTOR hereby relinquishes and conveys to the Grantee all right, title and interest in and to the subject property.

THIS conveyance is in accordance with a judgment of divorce granted by the State of Texas dissolving the marriage of Grantor and Grantee.

Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).

Signatures. The Grantor signs this Deed as of the date at the top of the first page.

Witnessed by: _____ (Seal)
CINDY DAWSON-AUSTIN

_____ _____ (Seal)
Name:

STATE OF , COUNTY OF SS.:

I CERTIFY that on , 1993 CINDY DAWSON-AUSTIN personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this Deed;

(b) signed, sealed and delivered this Deed as his or her act and deed; and

(c) made this Deed for $ None as the full and actual consideration paid or to be paid for the transfer of title. (Such consideration is defined in N.J.S.A. 46:15-5.)

_____
(Print name and title below signature)

Notary Public, State of
My Commission Expires:

DEED

Prepared by: (Print signer's name below signature)

_____

This Deed is made on , 1993, **BETWEEN** CINDY DAWSON-AUSTIN whose address is 70661 Oroville Circle, Rancho Mirage, California 92270 referred to as the Grantor, **AND** WILLIAM F. AUSTIN whose post office address is 5334 Harbor Town, Dallas, Texas 75287 referred to as the Grantee. The words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

Transfer of Ownership. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made pursuant to a judgment of divorce.

Tax Map Reference. (N.J.S.A. 46:15-2.1) Municipality of Mount Laurel, Block No. 1404, Lot No. 8, Account No.

☐ No property tax identification number is available on the date of this deed. (Check box if applicable.)

Property. The property consists of the land and all the buildings and structures on the land in the Township of Mount Laurel County of Burlington and State of New Jersey. The legal description is:

SEE SCHEDULE A ATTACHED HERETO AND MADE A PART HEREOF.

warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty, when the claim is by, through, or under Grantor but not otherwise.

When the context requires, singular nouns and pronouns include the plural.

Grantee assumes all ad valorem taxes due on the property for the current year.

Executed this day of , 1993.

_____

CYNTHIA LEE DAWSON-AUSTIN, Grantor

(Acknowledgment)

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on the day of , 1993, by CYNTHIA LEE DAWSON-AUSTIN.

_____

Notary Public,
Notary's name (printed):
Notary's commission expires:

AFTER RECORDING RETURN TO:
William Franklin Austin
5334 Harbor Town
Dallas, Texas 75287

DEED OF TRUST TO SECURE ASSUMPTION

Date: September , 1993

Grantor: William Franklin Austin

Grantor's Mailing Address: 5334 Harbor Town, Dallas, Collin County, Texas 75287

Trustee: Kenneth Raggio

Trustee's Mailing Address: 3316 Oak Grove Ave., Suite 100, Dallas, Texas 75204

Beneficiary: Cynthia Lee Dawson-Austin

Beneficiary's Mailing Address: 70661 Oroville Circle, Rancho Mirage, Riverside County, California 92270

Note and Deed of Trust Assumed

Date: April 30, 1992

Amount: $700,000.00

Maker and Grantor: William Franklin Austin

Payee and Beneficiary: North Park National Bank

Recording Information:

Property (including any improvements):

Lot 13, Block 1/8756 of Bent Tree North, an addition to the City of Dallas, Collin County, Texas, according to the plat thereof, recorded in Volume 8, Page 138, Map Records, Collin County, Texas, Certificate of Correction filed November 20, 1978, recorded in Volume 1144, Page 789 Deed Records, Collin County, Texas and filed in Dallas County in Volume 78053, Page 1968 Deed Records, Dallas County, Texas.

Prior Lien: None

Other Exceptions to Conveyance and Warranty: None

By deed dated the same as this instrument, Beneficiary conveyed the property to Grantor, who as part of the consideration promised to pay the note assumed and to be bound by the deed of trust assumed. Beneficiary has retained a vendor's lien.

For value received and to secure Grantor's assumption, Grantor conveys the property to Trustee in trust. Grantor warrants and agrees to defend the title to the property. If Grantor performs all the covenants of the note and deed of trust assumed and if Beneficiary has not filed a notice of advancement, a release of the deed of trust assumed shall release this deed of trust to secure assumption and Beneficiary's vendor's lien.

Beneficiary's Rights

1. Beneficiary may appoint in writing a substitute or successor trustee, succeeding to all rights and responsibilities of Trustee.

2. If Grantor fails to perform any of Grantor's obligations under the note or deed of trust assumed, Beneficiary may perform those obligations, advance funds required, and then be reimbursed by Grantor on demand for any sums so advanced, including attorney's fees, plus interest on those sums from the dates of payment at the highest legal rate. The sum to be reimbursed shall be secured by this deed of trust to secure assumption.

3. Beneficiary may file a sworn notice of such advancement in the office of the county clerk where the property is located. The notice shall detail the dates, amounts, and purposes of the sums advanced and the legal description of the property.

4. If Grantor fails on demand to reimburse Beneficiary for the sums advanced, and such failure continues after Beneficiary gives Grantor notice of the failure and the time within which it must be cured, as may be required by law or by written agreement, then Beneficiary may:

a. request Trustee to foreclose this lien, in which case Beneficiary or Beneficiary's agent shall give notice of the foreclosure sale as provided by the Texas Property Code as then amended; and

b. purchase the property at any foreclosure sale by offering the highest bid and then have the bid credited to the reimbursement of Beneficiary.

Trustee's Duties

If requested by Beneficiary to foreclose this lien, Trustee shall:

1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then amended;

2. sell and convey all or part of the property to the highest bidder for cash with a general warranty binding Grantor, subject to prior liens and to other exceptions to conveyance and warranty; and

3. from the proceeds of the sale, pay, in this order:

a. expenses of foreclosure, including a commission to Trustee of 5% of the bid;

b. to Beneficiary, the full amount advanced, attorney's fees, and other charges due and unpaid;

c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance.

General Provisions

1. If any of the property is sold under this deed of trust, Grantor shall immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor shall become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

2. Recitals in any Trustee's deed conveying the property will be presumed to be true.

3. Proceeding under this deed of trust to secure assumption, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

4. This lien shall be superior to liens later created even if Beneficiary has made no advancements when later liens are created.

5. If any portion of the advancements cannot be lawfully secured by this deed of trust to secure assumption, payments shall be applied first to discharge that portion.

6. No sale under this deed of trust to secure assumption shall extinguish the lien created by this instrument.

7. Grantor assigns to Beneficiary absolutely, not only as collateral, all present and future rent and other income and receipts from the property. Leases are not assigned. Grantor warrants the validity and enforceability of the assignment. Grantor may as Beneficiary's licensee collect rent and other income and receipts as long as Grantor is not in default under the note or the deed of trust assumed. Grantor will apply all rent and other income and receipts to payment of the note and performance of the deed of trust assumed, but if the rent and other income and receipts exceed the amount due under the note and deed of trust assumed, Grantor may retain the excess. If Grantor defaults in payment of the note or

performance of the deed of trust assumed, Beneficiary may terminate Grantor's license to collect and then as Grantor's agent may rent the property if it is vacant and collect all rent and other income and receipts. Beneficiary neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the property. Beneficiary may exercise Beneficiary's rights and remedies under this paragraph without taking possession of the property. Beneficiary shall apply all rent and other income and receipts collected under this paragraph first to expenses incurred in exercising Beneficiary's rights and remedies and then to Grantor's obligations under the note and deed of trust assumed in the order determined by Beneficiary. Beneficiary is not required to act under this paragraph, and acting under this paragraph does not waive any of Beneficiary's other rights or remedies. If Grantor becomes a voluntary or involuntary bankrupt, Beneficiary's filing a proof of claim in bankruptcy will be tantamount to the appointment of a receiver under Texas law.

8. Interest on the debt secured by this deed of trust to secure assumption shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law; any interest in excess of that maximum amount shall be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess shall be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides other provisions in this and all other instruments concerning the debt.

9. When the context requires, singular nouns and pronouns include the plural.

10. This deed of trust to secure assumption shall bind, inure to the benefit of, and be exercised by successors in interest of all parties.

_____

William Franklin Austin,
Grantor

(Acknowledgment)

STATE OF TEXAS

COUNTY OF DALLAS

This instrument was acknowledged before me on the day of , 1993, by William Franklin Austin.

_____

Notary Public,

_____

Notary's name (printed):

Notary's commission expires: _____

AFTER RECORDING RETURN TO:

Cynthia Lee Dawson Austin
70661 Oroville Circle
Rancho Mirage, Riverside County, California 92270

AFTER RECORDING, RETURN TO:
Ike Vanden Eykel, Esq.
Koons, Fuller & Vanden Eykel
2311 Cedar Springs, Suite 300
Dallas, Texas 75201

OREGON STATUTORY BARGAIN AND SALE DEED

CINDY DAWSON-AUSTIN, Grantor, conveys to WILLIAM F. AUSTIN, Grantee, the following described real property situated in Lane County, Oregon, to-wit:

> Beginning at the galvanized iron pipe and bronze disk marking the meander corner on the south shore of Mercer Lake on the east line of Section 36, Township 17 South, Range 12 West of the Willamette Meridian, said corner being described by General Land Office Dependent Survey as bearing North 1° 15′ West 29.02 chains from the southeast corner of said Section 36; thence North 89° 29′ West 1754.1 feet to a pipe on the east margin of Lakewood Avenue; thence North 7° 08′ West 323.1 feet along the East line of Lakewood Avenue to a point on the projection of the southerly line of Pine Street; thence South 83° 45′ West 404.3 feet along the southerly line of Pine Street to a point marked by an iron pipe, said point being true point of beginning; run thence South 7° 08′ East 132 feet to a point on the shore line of Mercer Lake; thence west along the shore of Mercer Lake to a point 70 feet west of the last mentioned point; thence North 7° 08′ West 132 feet more or less to the south line of Pine Street; thence North 83° 45′ East along the south line of Pine Street to the true point of beginning; in Lane County, Oregon.

EXHIBIT R

The true consideration for this conveyance is compliance with Decree of Dissolution of Marriage.

Until a change is requested, all tax statements are to be sent to the following address:

William F. Austin
5334 Harbor Town
Dallas, Texas 75287

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

DATED this day of , 1993.

Cindy Dawson-Austin

STATE OF _____ }
ss.
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of , 1993, by Cindy Dawson-Austin, who personally appeared and is personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged that she executed it.

Witness my hand and official seal.

_____
Notary Public for _____
My commission
Expires: _____

FOR VALUABLE CONSIDERATION, Cynthia Dawson-Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Lot 2, Block 3, Parkwood Knolls 19th Addition, according to the plat thereof on file and of record in the office of the Registrar of Titles, in and for Hennepin County, Minnesota.

Restrictions, covenants and conditions dated May 22, 1975, filed May 27, 1975 as Document No. 1140572.

Utility easement over 10 feet adjoining street as shown on recorded plat. Utility easement over rear, front and side 5 feet where necessary as reserved in Document No. 1140572.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson-Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT S

whose post office address is 5334 Harbor Town, Dallas, Texas 75287 referred to as the Grantee. The words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

Transfer of Ownership. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made pursuant to a judgment of divorce.

Tax Map Reference. (N.J.S.A. 46:15-2.1) Municipality of Mount Laurel, Block No. 1404, Lot No. 8, Account No.

☐ No property tax identification number is available on the date of this deed. (Check box if applicable.)

Property. The property consists of the land and all the buildings and structures on the land in the Township of Mount Laurel County of Burlington and State of New Jersey. The legal description is:

SEE SCHEDULE A ATTACHED HERETO AND MADE A PART HEREOF.

EXHIBIT X

PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES.

DATED this day of , 1993.

_____
Cindy Dawson Austin

STATE OF _____ }
County of _____ } ss.

The foregoing instrument was acknowledged before me this day of , 1993, by Cindy Dawson Austin, who personally appeared and is personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged that she executed it.

Witness my hand and official seal.

_____
Notary Public
for _____
My Commission
Expires: _____

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Units Nos. RA419 and GA38, Condominium No. 287, Fountain Woods, a Condominium located in the County of Hennepin; pursuant to the Declaration Document No. 1566985 and the Bylaws Document No. 1566986;

Subject to the provisions, restrictions, obligations and easements as set forth in said Declaration Document No. 1566985 and Bylaws Document No. 1566986;

Subject to easements for ingress, egress, utility and use of swimming pool and tennis court and uses related thereto for the benefit of the North 426.50 feet of Outlot C, Walnut Ridge Third Addition and together with easements for utility purposes over the North 426.50 feet of said Outlot C for the benefit of the land in said Condominium No. 287, all as created in Declaration

of Easements Document No. 1550710. Files of the Registrar of Titles; (See Inst.).

Subject to the provisions of Minnesota Uniform Condominium Act, Minnesota Statutes 1980, Chapter 515A and Acts Amendatory thereof.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT E

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

> Residential Unit No. RC109 and Garage Unit No. GC64 in Fountain Woods II, a Condominium, Condominium No. 496, located at 6730 Vernon Avenue, Edina, Minnesota, on land legally described as follows: The north 426.5 feet of Outlot C, Walnut Ridge Third Addition according to the plat thereof on file in the office of the Registrar of Titles, Hennepin County, Minnesota.
>
> The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT F

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

> Residential Unit No. RD119 and Garage Unit No. GD17 in Fountain Woods II, a Condominium, Condominium No. 496, located at 6670 Vernon Avenue, Edina, Minnesota, on land legally described as follows: The north 426.5 feet of Outlot C, Walnut Ridge Third Addition according to the plat thereof on file in the office of the Registrar of Titles, Hennepin County, Minnesota.
>
> The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }

COUNTY OF ____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT G

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Units RD 209 and GD 58, Condominium No. 496, Fountain Woods II, a Condominium located in the County of Hennepin; pursuant to the Declaration Document No. 1604642 and the Bylaws Document No. 1604643.

Subject to the provisions, restrictions, obligations and easements as set forth in the Declaration Document No. 1604642 and the Bylaws document No. 1604643;

Subject to the provisions of Minnesota Uniform Condominium Act, Minnesota Statutes 1980, Chapter 515A and Acts Amendatory thereof;

Subject to and together with Declaration of Easements Document No. 1550710 as determined by Court Order Document No. 1604641.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____
Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT H

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

> Residential Unit No. RD409 and Garage Unit No. GD57 in Fountain Woods II, a Condominium, Condominium No. 496, located at 6670 Vernon Avenue, Edina, Minnesota, on land legally described as follows: The north 426.5 feet of Outlot C, Walnut Ridge Third Addition according to the plat thereof on file in the office of the Registrar of Titles, Hennepin County, Minnesota.
>
> The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described

property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }

COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT I

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

_____
County Auditor

by _____
Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Unit Nos. RD 419 and GD 18. Condominium No. 496, Fountain Woods II, a Condominium located in the County of Hennepin; pursuant to the Declaration Document No. 1604642 and the Bylaws Document No. 1604643.

Subject to the provisions, restrictions, obligations and easements as set forth in the Declaration Document No. 1604642 and the Bylaws Document No. 1604643;

Subject to the provisions of Minnesota Uniform Condominium Act, Minnesota Statutes 1980, Chapter 515A and Acts Amendatory thereof;

Subject to and together with Declaration of Easements Document No. 1550710 as determined by Court Order Document No. 1604641.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

Cynthia Dawson Austin

STATE OF _____ }
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____
Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT J

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Residential Unit No. RC219 and Garage Unit No. GC12 in Fountain Woods II, a Condominium, Condominium No. 496, located at 6730 Vernon Avenue, Edina, Minnesota, on land legally described as follows: The north 426.5 feet of Outlot C, Walnut Ridge Third Addition according to the plat thereof on file in the office of the Registrar of Titles, Hennepin County, Minnesota.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described

property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT K

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, aka Cindy Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Lots 25, 26, and 27, "Wilcox Old Orchard Addition, Hennepin County, Minnesota".

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the

above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT L

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.
, 19

_____

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, aka Cynthia Lee Dawson, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Lot 17, Block 3, Beachside.

Subject to Declaration of covenants, easements, restrictions contained in Document No. 1300115, and easements for driveway in Document No. 1300116.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described

property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT M

No delinquent taxes and transfer entered; Certificate of Real Estate Value ( ) filed ( ) not required
Certificate of Real Estate Value No.

, 19

_____

County Auditor

by _____

Deputy

STATE DEED TAX DUE HEREON: $1.65

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, aka Cindy Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in McLeod County, Minnesota, described as follows:

Lot 6 and 7, Block 68 in the Town of Franklin in McLeod County, Minnesota.

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in

any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

_____

Cynthia Dawson Austin

STATE OF _____ }

COUNTY OF _____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

_____

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT N

DEED

Prepared by (Print signer's name below signature)

_____

This Deed is made on , 1993, **BETWEEN** CYNTHIA AUSTIN whose address is 70661 Oroville Circle, Rancho Mirage, California 92270 referred to as the Grantor, **AND** WILLIAM F. AUSTIN whose post office address is 5334 Harbor Town, Dallas, Texas 75287 referred to as the Grantee. The words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

Transfer of Ownership. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made pursuant to a judgment of divorce.

Tax Map Reference. (N.J.S.A. 46:15-2.1) Municipality of Cherry Hill, Block No. 337.99, Lot No. 601, Account No.

☐ No property tax identification number is available on the date of this deed. (Check box if applicable.)

Property. The property consists of the land and all the buildings and structures on the land in the Township of Cherry Hill, County of Camden and State of New Jersey. The legal description is:

SEE SCHEDULE A ATTACHED HERETO AND MADE A PART HEREOF.

EXHIBIT O

Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).

Signatures. The Grantor signs this Deed as of the date at the top of the first page.

Witnessed by: _____ (Seal)
CYNTHIA AUSTIN

_____ _____ (Seal)
Name:

STATE OF , COUNTY OF SS.:

I CERTIFY that on , 1993, CYNTHIA AUSTIN personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this Deed;

(b) signed, sealed and delivered this Deed as his or her act and deed; and

(c) made this Deed for $ None as the full and actual consideration paid or to be paid for the transfer of title. (Such consideration is defined in N.J.S.A. 46:15-5.)

(Print name and title below Signature)

Notary Public, State of
My Commission Expires:

SCHEDULE A

BEING Unit No. 601 as shown in Exhibit B-4 of the Master Deed creating and establishing Kings Croft III, a Condominium, as provided by the Condominium Act of the State of New Jersey (P.L. 1969, c. 257, effective January 7, 1970) given by Bob Scarborough, Inc., (Corp. NJ), under date of October 31, 1978 and recorded in the Register of Deeds Office of Camden County on November 15, 1978 in Deed Book 3601, Page 745, and also the undivided .00788 of the Common Elements appertaining to said Unit, as shown in Exhibit "D" of said Master Deed.

SUBJECT to the provisions of the Condominium Act of the State of New Jersey (R.S. 46:8B-1, et seq.), its supplements and amendments, and to the conditions, restrictions, covenants and agreements as set forth in the said Master Deed, including the By-laws of Kings Croft III, a Condominium, and any amendments thereto.

BEING known and designated as Block 337.99, Lot 601 on the official tax maps of the Township of Cherry Hill, Camden County, New Jersey.

BEING ALSO known and designated as 601 Kings Croft, Cherry Hill, New Jersey.

BEING the same premises conveyed to William F. Austin and Cynthia Austin, husband and wife, by deed dated March 9, 1984 from Martin A. Finkel and Bonnie Bazilian Finkel, his wife, which was recorded in the Office of the Register of Deeds of Camden County on March 14, 1984 in Deed Book 3956, Page 779.

GRANTOR hereby relinquishes and conveys to the Grantee all right, title and interest in and to the subject property.

THIS conveyance is in accordance with a judgment of divorce granted by the State of Texas dissolving the marriage of Grantor and Grantee.

STATE OF NEW JERSEY
AFFIDAVIT OF CONSIDERATION OR EXEMPTION
(c. 49, P.L. 1968)
or
PARTIAL EXEMPTION
(c. 176, P.L. 1975)

To Be Recorded With Deed Pursuant to c. 49, P.L. 1968, as amended by c. 225, P.L. 1985 (N.J.S.A. 46:15-5 et seq.)

STATE OF
COUNTY OF _____ } ss.

FOR RECORDER'S USE ONLY
Consideration $ _____
Realty Transfer Fee $ _____ *
Date _____ By _____

* Use symbol "C" to indicate that fee is exclusively for county use.

(1) PARTY OR LEGAL REPRESENTATIVE (See Instructions #3, 4 and 5 on reverse side)

Deponent, (Name) CYNTHIA AUSTIN, being duly sworn according to law upon his/her oath deposes and says that she is the (State whether Grantor, Grantee, Legal Representative, Corporate Officer, Officer of Title Co. Lending Institution, etc.) Grantor in a deed dated , 1993, transferring real property identified as Block No. 337.99 Lot No. 601 located at (Street Address, Municipality, County) 601 Kings Croft, Township of Cherry Hill, Camden County, New Jersey and annexed hereto.

(2) CONSIDERATION (See Instruction #6)

Deponent states that, with respect to deed hereto annexed, the actual amount of money and the monetary value of any other thing of value constituting the entire compensation

paid or to be paid for the transfer of title to the lands, tenements or other realty, including the remaining amount of any prior mortgage to which the transfer is subject or which is to be assumed and agreed to be paid by the grantee and any other lien or encumbrance thereon not paid, satisfied or removed in connection with the transfer of title is $ None

(3) FULL EXEMPTION FROM FEE Deponent claims that this deed transaction is fully exempt from the Realty Transfer Fee imposed by c. 49, P.L. 1968, for the following reason(s): Explain in detail. (See Instruction #7.) Mere reference to exemption symbol is not sufficient.

(p) Recorded within 90 days following the entry of a divorce decree which dissolves the marriage between the grantor and grantee.

(4) PARTIAL EXEMPTION FROM FEE *NOTE: All boxes below apply to grantor(s) only. ALL BOXES IN APPROPRIATE CATEGORY MUST BE CHECKED. Failure to do so will void claim for partial exemption. (See Instructions #8 and #9)*

Deponent claims that this deed transaction is exempt from the increased portion of the Realty Transfer Fee imposed by c. 176, P.L. 1975 for the following reason(s):

a) SENIOR CITIZEN (See Instruction #8)

- ☐ Grantor(s) 62 yrs. of age or over.*
- ☐ One or two-family residential premises.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ No joint owners other than spouse or other qualified exempt owners.

---

b) BLIND (See Instruction #8)

- ☐ Grantor(s) legally blind.*
- ☐ One or two-family residential premises.

☐ Owned and occupied by grantor(s) at time of sale.

☐ No joint owners other than spouse or other qualified exempt owners.

DISABLED (See Instruction #8)

☐ Grantor(s) permanently and totally disabled.*

☐ One or two-family residential premises.

☐ Receiving disability payments.

☐ Owned and occupied by grantor(s) at time of sale.

☐ Not gainfully employed.

☐ No joint owners other than spouse or other qualified exempt owners.

* IN THE CASE OF HUSBAND AND WIFE, ONLY ONE GRANTOR NEED QUALIFY.

---

c) LOW AND MODERATE INCOME HOUSING (See Instruction #8)

☐ Affordable According to H.U.D. Standards.

☐ Meets Income Requirements of Region.

☐ Reserved for Occupancy.

☐ Subject to Resale Controls.

---

d) NEW CONSTRUCTION (See Instruction #9)

☐ Entirely new improvement.

☐ Not previously used for any purpose.

☐ Not previously occupied.

Deponent makes this Affidavit to induce the County Clerk or Register of Deeds to record the deed and accept the fee submitted herewith in accordance with the provisions of c. 49, P.L. 1968.

Subscribed and Sworn to before me this day of , 1993.

	CYNTHIA AUSTIN
Name of Deponent (sign above line)	Name of Grantor (type above line)
70661 Oroville Circle Rancho Mirage, CA 92270	70661 Oroville Circle Rancho Mirage, CA 92270
Address of Deponent	Address of Grantor at Time of Sale

FOR OFFICIAL USE ONLY

This space for use of County Clerk or Register of Deeds.

Instrument Number _____ County _____

Deed Number _____ Book _____ Page _____

Deed Dated _____ Date Recorded _____

IMPORTANT — BEFORE COMPLETING THIS AFFIDAVIT, PLEASE READ THE INSTRUCTIONS ON THE REVERSE SIDE HEREOF.

This form is prescribed by the Director, Division of Taxation in the Department of the Treasury, as required by law, and may not be altered or amended without the approval of the Director.

ORIGINAL — White copy to be retained by County.

DUPLICATE — Yellow copy to be forwarded by County to Division of Taxation on partial exemption from fee (N.J.A.C. 18:16 — 8.12).

TRIPLICATE — Pink copy is your file copy.

EXHIBIT O

Date: September , 1993

FOR VALUABLE CONSIDERATION, Cynthia Dawson Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in McLeod County, Minnesota, described as follows:

That part of the West Half of the West Half of the Northeast Quarter of Section 18, Township 115, Range 27, McLeod County, Minnesota described as follows:

Commencing on the north-south quarter line 456.5 feet North of the center of said Section 18, said point being on the northerly right-of-way line of Trunk Highway #212; thence North along the north-south quarter line of said Section 18, a distance of 58.02 feet to a point 58.00 feet Northerly of the northerly right-of-way line of Trunk Highway #212, as measured at right angles to said right-of-way line, said point being the actual point of beginning of the tract to be described; thence continuing North along said north-south quarter line, a distance of 331.14 feet; thence North 89 degrees 19 minutes 00 second East parallel to the south line of 11th Street, a distance of 133.00 feet to a point on the west line of the East 33.00 feet of the West 166.00 feet of said West half of West Half of the Northeast Quarter; thence on a bearing of South parallel to said north-south quarter line, a distance of 335.74 feet to a point 58.00 feet Northerly of the northerly right-of-way line of Trunk Highway #212, as measured at right angles to said right-of-way line; thence North 88 degrees 42 minutes 00 seconds West parallel with said northerly right-of-way line of Trunk Highway #212, a distance of 133.02 feet to the point of beginning. This tract contains 1.02 acres of land and is subject to any and all easements of record;

and

That part of the East Half of the Northwest Quarter of Section Eighteen (18) Township One Hundred Fifteen (115) North of Range Twenty-seven (27) West described as follows:

Commencing on the north-south quarter line 456.5 feet North of the center of said Section 18, said point being on the northerly right-of-way line of Trunk Highway #212; thence North along the north-south quarter line of said Section 18, a distance of 389.16 feet; thence South 89 degrees 19 minutes 00 seconds West parallel to the south line of 11th Street, a distance of 33.00 feet to the actual point of beginning of the tract to be described; thence continuing South 89 degrees 19 minutes 00 seconds West parallel to said south line of 11th Street, a distance of 446.81 feet to a point on a 50.00 foot radius curve, center of circle of said curve is described as follows:

Commencing at the intersection of the northerly right-of-way line of Trunk Highway #212 as now located and the east line of said Northwest Quarter, said point being 456.50 feet North of the southeast corner of said Northwest Quarter; thence on an assumed bearing of North 88 degrees 42 minutes 00 seconds West along said northerly right-of-way line, a distance of 490.00 feet; thence North 00 degrees 00 minutes 00 seconds West, a distance of 324.20 feet; thence continuing North 00 degrees 00 minutes 00 seconds West, a distance of 66.00 feet to a point on a 50.00 foot radius curve, center of circle bears South 48 degrees 42 minutes 00 seconds West from said point.

Thence Northwesterly along said curve, an arc length of 20.68 feet, central angle 23 degrees 41 minutes

51 seconds to a point 490.00 feet West of said north-south quarter line as measured parallel to the northerly right-of-way line of Trunk

EXHIBIT P

A-95

DEED

CYNTHIA AUSTIN

Grantor,

TO

WILLIAM F. AUSTIN

Grantee.

Dated: , 1998

Record and return to:

Attention: Ike Vanden Eykel, Esq.
Koons, Fuller & Vanden Eykel
2311 Cedar Springs
Suite 300
Dallas, Texas 75201

FOR VALUABLE CONSIDERATION, Cynthia Dawson-Austin, a single person, as Grantor (whether one or more), hereby conveys and quitclaims to William F. Austin, a single person, as Grantee (whether one or more), real property in Hennepin County, Minnesota, described as follows:

Lot 8 and That part of Lot 7, lying Easterly of a line described as beginning at the Southeast corner of said Lot 7, thence Northerly at right angles to the South line of said Lot 7 to its intersection with the Northerly line of said Lot 7 and there terminating;

All in Block 1, Claradon Park, according to the plat thereof on file or of record in the office of the Registrar of Titles in and for said County.

Subject to utility and drainage easements as shown on plat.

Subject to and together with an easement for utilities as shown in deed Doc No 1095526, Files of Registrar of Titles; (as to Lots 7 & 8)

Subject to and together with the reservation of an easement for the purpose of construction, operating and repairing any utilities as shown in deed Doc No 1101348, Files of Registrar of Titles; (See Inst) (as to Lot 8).

The consideration for this transfer is less than $500. Grantor certifies that Grantor does not know of any wells on the described real property.

together with all hereditaments and appurtenances belonging thereto. Grantor covenants and represents that:

(1) This Deed conveys after-acquired title; and

(2) Grantor has not made, done, executed or suffered any act or thing whereby the above-described

property or any part thereof, now or at any time hereafter, shall or may be imperiled, charged or incumbered in any manner, and Grantor will warrant the title to the above-described property against all persons claiming the same from or through Grantor as a result of any such act or thing, EXCEPT: the lien of all unpaid special assessments and therein thereon; and all liens and restrictions of record.

Affix Deed Tax Stamp Here

Cynthia Dawson-Austin

STATE OF _____ }
COUNTY OF ____ }

The foregoing instrument was acknowledged before me this day of September, 1993, by .

Affix Notarial Stamp

Signature of Person Taking Acknowledgment

This Instrument was Drafted by:
The Curtin Law Office, P.A.
8500 Normandale Lake Boulevard
Suite 960
Minneapolis, MN 55437

EXHIBIT Q

No. 92-14835-T

ENDORSEMENT ON INSTRUMENT

William Franklin Austin
vs.
Cynthia Lee Dawson-Austin

FINAL DECREE OF DIVORCE

Signed and Entered: September 28, 1993
Recorded in Vol T 160, page 261

IN THE MINUTES OF THE 301ST JUDICIAL
DISTRICT COURT OF DALLAS COUNTY, TEXAS

NO. 92-1483

In the Matter of the Marriage of **William Franklin Austin and Cynthia Lee Dawson-Austin**	**In the District Court of Dallas County, Texas T-301st Judicial District**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Texas Rules of Civil Procedure Rule 296 and Rule 297, the Court hereby files its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The parties were married on August 23, 1980.

2. The parties separated and ceased to live together as husband and wife on or about November 1991.

3. The Court, having examined the pleadings and heard the evidence and being fully advised of the premises, finds:

a. all necessary residence requirements and prerequisites of law have been satisfied;

b. that the Court has jurisdiction of all the parties and subject matter of the cause;

c. that there is no child born of this marriage, and none were adopted and none are expected;

d. that a divorce should be granted herein; and

e. that the property should be divided in an equitable manner.

4. CYNTHIA LEE DAWSON-AUSTIN obtained a status only Judgment of Dissolution of Marriage in cause num-

ber ID 026525, Riverside County, State of California on August 6, 1993. The Court, having examined such decree and applicable authorities as presented to the Court, finds that such decree is not a final decree in Texas as that term is known in law and is therefore not entitled to full faith and credit. The Court also finds that the California court made no attempt to divide the property of the parties and further that the court had no jurisdiction to divide the property claimed by the Respondent because at the time of the status adjudication, the Respondent was in a bankruptcy proceeding which had deprived the California court of any jurisdiction to divide the property. Further, the Court finds, that notwithstanding the bankruptcy proceeding, the California court expressly reserved jurisdiction to divide the property, and therefore it has never attempted to divide the property. Since the California court did not attempt to divide any property, this Court finds Texas Family Code §3.91(b) inapplicable to this case.

5. The Court finds that although CYNTHIA LEE DAWSON-AUSTIN did file her cause of action for divorce in California before WILLIAM FRANKLIN AUSTIN filed his cause of action for divorce in Texas, the Court finds that CYNTHIA LEE DAWSON-AUSTIN exercised no diligence in securing service of process upon WILLIAM FRANKLIN AUSTIN and did not attempt to effectively prosecute her case until after she was served with process in this action. The Court also finds that WILLIAM FRANKLIN AUSTIN filed his suit on September 10, 1992 and prosecuted his suit with diligence and that CYNTHIA LEE DAWSON-AUSTIN was served at her home on Monday, September 14, 1992.

6. The following disproportionate division of the estate of the parties in favor of CYNTHIA LEE DAWSON-AUSTIN is a just and right division of the parties' marital estate, having due regard for the rights of each party. In determining the rights of each party, the Court has given due and proper

consideration to all applicable factors, including without limitation, the following:

a. long before his marriage to CYNTHIA LEE DAWSON-AUSTIN, WILLIAM FRANKLIN AUSTIN was and has continued to be the President of Starkey Laboratories, Inc. and devoted his full time and efforts to the business of Starkey Laboratories, Inc.;

b. WILLIAM FRANKLIN AUSTIN during his marriage to CYNTHIA LEE DAWSON-AUSTIN was adequately compensated for the time, toil and talent he devoted to the operation of Starkey Laboratories, Inc. Further, WILLIAM FRANKLIN AUSTIN during his marriage to CYNTHIA LEE DAWSON-AUSTIN was adequately compensated for work done beyond preserving and maintaining the separate estate of WILLIAM FRANKLIN AUSTIN and there has been no unjust enrichment of his separate estate to the detriment of the community estate;

c. the separate property of WILLIAM FRANKLIN AUSTIN, namely Starkey Laboratories, Inc. is not the alter ego of WILLIAM FRANKLIN AUSTIN and it has not been used as an unfair device;

d. WILLIAM FRANKLIN AUSTIN has not diverted community opportunity to the detriment of the community estate. Furthermore, WILLIAM FRANKLIN AUSTIN owed fiduciary obligations to Starkey Laboratories, Inc. under corporate law and WILLIAM FRANKLIN AUSTIN properly balanced his fiduciary obligation to the corporation against his obligations to the community estate and his duty to the community estate was fully discharged by receiving adequate compensation for his time, talent and labor during his marriage to CYNTHIA LEE DAWSON-AUSTIN;

e. CYNTHIA LEE DAWSON-AUSTIN worked throughout nearly her entire marriage to WILLIAM FRANKLIN AUSTIN and she worked in a number of management and executive positions and she earned in excess of $70,000 per year from such employment;

f. both parties are in good health;

g. both parties are capable of continuing employment;

h. CYNTHIA LEE DAWSON-AUSTIN is 48 years of age and has no minor children of this or any other marriage;

i. WILLIAM FRANKLIN AUSTIN is 51 years of age and has no minor children of this or any other marriage;

j. CYNTHIA LEE DAWSON-AUSTIN does not have sufficient capacity to maintain the standard of living established during marriage to Petitioner, WILLIAM FRANKLIN AUSTIN, without other sources of income. In its division of community property, the Court has considered the standard of living enjoyed by the parties during the marriage. The division of community property and community debts is designed to assist both parties in maintaining, to the extent possible, under the circumstances of this case, a standard of living substantially similar to that enjoyed by the parties during the marriage.

k. CYNTHIA LEE DAWSON-AUSTIN has 3 years of college, numerous graduate courses, and she is skilled in the hearing health care industry, and furthermore, is personally acquainted with most of the major people involved in such industry;

l. before marriage, CYNTHIA LEE DAWSON-AUSTIN worked in the hearing health care industry and was self-sufficient;

m. CYNTHIA LEE DAWSON-AUSTIN was duly and adequately compensated for the time, toil and talent she devoted to her work on behalf of Starkey Laboratories, Inc. and/or Starkey Hearing Foundation during her marriage to WILLIAM FRANKLIN AUSTIN;

n. in addition to CYNTHIA LEE DAWSON-AUSTIN's work during her marriage she devoted a large amount of time to social and recreational activities and domestic help and was always available so that her domestic duties were minimal;

o. CYNTHIA LEE DAWSON-AUSTIN made no contribution to the attainment by Petitioner, WILLIAM FRANKLIN AUSTIN, of an education, training, career, position or ownership in Starkey Laboratories, Inc. Furthermore, the Court finds that WILLIAM FRANKLIN AUSTIN received his education and training relative to his occupation before his marriage to CYNTHIA LEE DAWSON-AUSTIN and that the community estate has benefitted from the education, training and employment which WILLIAM FRANKLIN AUSTIN brought into his marriage with CYNTHIA LEE DAWSON-AUSTIN;

p. WILLIAM FRANKLIN AUSTIN's standard of living is modest commensurate with his income;

q. WILLIAM FRANKLIN AUSTIN lives in a four bedroom house, in an upper middle class neighborhood and drives a 1979 Mercedes automobile;

r. the parties enjoyed an upper middle class or higher standard of living during marriage. In addition to the residence of WILLIAM FRANKLIN AUSTIN in

Texas, the parties maintained residences in Minnesota, California, and Florida. They traveled periodically to other places and attended social and recreational events frequently;

s. in making the division of property, almost all marital debt (with the exception of the mortgage on the Rancho Mirage property awarded to CYNTHIA LEE DAWSON-AUSTIN and other minor indebtedness) will be assumed by WILLIAM FRANKLIN AUSTIN and there will be very little debt to be paid by CYNTHIA LEE DAWSON-AUSTIN;

t. the unequal division of property hereinafter awarded in favor of CYNTHIA LEE DAWSON-AUSTIN, is to provide her with a higher standard of living than she would have if the Court were to divide the property equally. Furthermore, the unequal division of property is to help her meet her needs for future support;

u. WILLIAM FRANKLIN AUSTIN will assume substantial community debt following this divorce, including payment of attorneys' fees for CYNTHIA LEE DAWSON-AUSTIN leaving her virtually debt free following the divorce;

v. CYNTHIA LEE DAWSON-AUSTIN shot at WILLIAM FRANKLIN AUSTIN with a pistol, intending bodily harm or death to him;

w. CYNTHIA LEE DAWSON-AUSTIN has no dependents that would preclude her engaging in gainful employment;

x. in dividing the estate of the parties, a fair and reasonable return on the invested capital of WILLIAM FRANKLIN AUSTIN in Starkey Laboratories, Inc. was considered by the Court; and

y. in making the division of property disproportionately in favor of CYNTHIA LEE DAWSON-AUSTIN, the Court considered that WILLIAM FRANKLIN AUSTIN unilaterally offered to pay alimony of $3,000 per month to CYNTHIA LEE DAWSON-AUSTIN for the rest of her life.

z. during the trial of this case, the Court ordered WILLIAM FRANKLIN AUSTIN to pay for round trip tickets for 8 witnesses of Respondent's choosing to fly from any destination in the United States to appear at trial in Dallas, Texas. The Court finds that CYNTHIA LEE DAWSON-AUSTIN did not take advantage of this opportunity to present evidence in this case.

7. CYNTHIA LEE DAWSON-AUSTIN has attempted to obstruct the orderly process of this case in the following ways:

a. in January 1993, CYNTHIA LEE DAWSON-AUSTIN requested a delay of the trial setting then set for February 15, 1993 in order to receive the audited financial statements pertaining to Starkey Laboratories, Inc. which delay was granted by the Court;

b. as the trial date of April 12, 1993 approached, that CYNTHIA LEE DAWSON-AUSTIN employed Toby Goodman, a member of the Texas Legislature, obtaining a mandatory legislative continuance further delaying trial of the case;

c. CYNTHIA LEE DAWSON-AUSTIN on the eve of trial on July 1, 1993 attempted to discharge her counsel in an effort to further delay this case;

d. CYNTHIA LEE DAWSON-AUSTIN, although fully aware of the issues regarding adequacy of compensation in this case and the value of Starkey Laboratories,

Inc. as it may have been enhanced during marriage, was not forthcoming in her responses to proper discovery request asking for the identification of her testifying expert witnesses and that her answers in this case were not timely filed and that such answers were not verified or signed by the Respondent and that such answers identifying the experts were not made as soon as practical. The Court finds that such experts were hired in January 1993 and not disclosed until after May 31, 1993;

e. during trial Respondent filed for bankruptcy, further delaying the trial. She subsequently dismissed such bankruptcy petition and then immediately sought an additional delay in the trial of this case. The Court finds, that although she was seeking the protection of bankruptcy in California, she proceeded to obtain a status only adjudication;

f. CYNTHIA LEE DAWSON-AUSTIN, on the record, although stating she wished to discharge her lawyers, withdrew such motion and proceeded to trial. During the trial of this case Respondent was represented or assisted by eight different lawyers, three of whom are board certified in family law by the Texas Board of Legal Specialization; and

g. Respondent, during the course of this case, claimed to be emotionally and mentally incapable of participating in the preparation and presentation of her case. That the Court ordered Respondent to present herself to the Mennenger Clinic in San Francisco, California for evaluation and treatment. The Court ordered Petitioner to make financial arrangements for such medical examination, evaluation and any necessary treatment of Respondent. The Court finds that Petitioner did make the required arrangements as ordered. Following the making of such arrangements, Respondent filed a motion

with this Court stating she had, for several days, participated in the taking of Petitioner's deposition, preparation of document requests, examination of Petitioner's business records produced, and in light of same, Respondent asked for rescission of the order for medical examination and treatment by Mennenger Clinic as she was capable of assisting in the preparation and presentation of her case.

CONCLUSIONS OF LAW

1. The First Amended Original Petition for Divorce filed by WILLIAM FRANKLIN AUSTIN is in due form and contains all allegations required by law.

2. The Court has jurisdiction of the parties and of the subject matter of this cause.

3. All legal prerequisites to the granting of the divorce have been met.

4. All property belongs to the community except for the following which belongs to the separate estate of Petitioner or Respondent:

a. 100% ownership interest in Starkey Laboratories, Inc. was and has been at all times the separate property of WILLIAM FRANKLIN AUSTIN. The Court further finds that the situs of the 60 shares of stock, representing 100% ownership of Starkey Laboratories, Inc., as evidenced by stock certificate number 1, has been at all relevant times during the pendency of this case, in Dallas County, Texas and this Court has jurisdiction to make a final and permanent adjudication of its marital character herein. The Court finds that the stock certificate evidencing the 60 shares of stock of Starkey Laboratories, Inc. was not and has not at any relevant time been atypically

removed from any other jurisdiction, nor atypically brought to this jurisdiction.

b. the following property described below is Respondent's separate property:

> Section 27, T 13 S, R 10 W, County of Lincoln, as platted and recorded in Book 38, Page 1376, Lincoln County Deed Records, in Lincoln County, Oregon, more commonly known as river lot, Walport, Oregon.

5. The division of the property of Petitioner and Respondent effected by the final judgment is just and right, having due regard for the rights of each party.

6. the fair and just division of the community estate is based on the nature of the property, health of the parties, disparity of ages, educational background, earning ability, wife's future support needs, and any reimbursement claim, if such existed. *Francis v. Francis,* 412 S.W.2d 29, 32 (Tex. 1967). Copy of opinion attached.

7. The adequacy of WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN's compensation from Starkey Laboratories, Inc. was duly considered by the Court under the doctrine announced in *Jensen v. Jensen,* 665 S.W.2d 107 (Tex. 1984). The claim as to community compensation for the time, toil, talent and effort of both WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN is denied. The Court finds that the parties were adequately compensated. Copy of opinion attached.

8. The Court further finds that the unequal division of property in favor of CYNTHIA LEE DAWSON-AUSTIN is in the nature of an alimony-substitute, support or maintenance, however termed and as such is intended to meet CYNTHIA LEE DAWSON-AUSTIN's future needs and in

accordance with *In re: Nunnally,* 506 F.2d 1024, 1027 (5th Cir. 1975) and *Erspan v. Badgett,* 647 F.2d 550 (5th Cir. 1981) and intended to be non-dischargeable as alimony. Copies of opinions attached.

9. CYNTHIA LEE DAWSON-AUSTIN should be awarded the following property:

a. Real property and improvements located thereon, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, warranties and service contracts, and title and closing documents, more particularly described as:

(1) 70661 Oroville Circle, Rancho Mirage, California;

(2) 8 Birchfield Drive, Mt. Laurel, New Jersey;

(3) 6120 Pine Street, Florence, Oregon;

(4) Parcel 16.00, Section 27, T13S, R10W, Lincoln County, Oregon; and

(5) 5555 Collins Ave., Miami, Florida.

b. All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the control of Respondent, CYNTHIA LEE DAWSON-AUSTIN.

c. ½ of the artwork and collections of WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN.

d. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Respondent, CYNTHIA LEE DAWSON-AUSTIN.

e. Any and all sums of cash on deposit in Norwest Bank, Minneapolis, Account #2735777; and Citizen State Bank Account #632083.

f. The following life insurance policies insuring the life of CYNTHIA LEE DAWSON-AUSTIN, together with any and all cash surrender value associated therewith and any and all contingent beneficial interest:

(1) Summit National Life Policy Number SN8904953U.

g. The 1979 Mercedes motor vehicle, vehicle identification number 116003612006392, together with all prepaid insurance, keys, and title documents.

h. The 1975 Westlake mobile home, together with all prepaid insurance, keys, and title documents.

i. 33.32% of the Starkey Employees Savings and Retirement Plan, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to the Starkey Employees Savings and Retirement Plan existing by reason of WILLIAM FRANKLIN AUSTIN'S past employment with Starkey Laboratories, Inc., accordance with a Qualified Domestic Relations Order to be signed on the same day as this Final Decree of Divorce.

j. Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses or other benefit program existing by reason of CYNTHIA LEE DAWSON-AUSTIN'S past, present and future employment.

k. The Thunderbird Club membership.

10. WILLIAM FRANKLIN AUSTIN should be awarded the following property:

a. Real property and improvements located thereon, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, warranties and service contracts, and title and closing documents, more particularly described as:

(1) 6650 Vernon Ave. South, Edina, Minnesota, Units No. 219, 319, 406 and 419;

(2) 6670 Vernon Ave. South, Edina, Minnesota, Units 109, 119, 209, 409 and 419;

(3) 6730 Vernon Ave. South, Edina, Minnesota, Unit 219;

(4) 230 Birch Bluff, Tonka Bay, Minnesota;

(5) 5321 Beachside, Minnetonka, Minnesota;

(6) 706 Chandler Ave., Glencoe, Minnesota;

(7) 601 Kings Croft, Cherry Hill, New Jersey;

(8) 2915 East 10th Street, Glencoe, Minnesota;

(9) 9505 Hamilton Ave., Eden Prairie, Minnesota;

(10) 2255 Northeast 194th Ave., Portland, Oregon;

(11) 6701 Field Way, Edina, Minnesota;

(12) 205 Ellen, Nixa, Missouri;

(13) 208 Poplar, Nixa, Missouri;

(14) 5334 Harbor Town, Dallas, Texas:

b. All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the control of Petitioner, WILLIAM FRANKLIN AUSTIN.

c. ½ of the artwork and collections of WILLIAM FRANKLIN AUSTIN and CYNTHIA LEE DAWSON-AUSTIN.

d. All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner, WILLIAM FRANKLIN AUSTIN.

e. Any and all sums of cash on deposit in Compass Bank, Dallas, Texas, Account #73124328; and NorthPark National, Dallas, Texas, Account #5091426.

f. The following life insurance policies insuring the life of WILLIAM FRANKLIN AUSTIN, together with any and all cash surrender value associated therewith and any and all contingent beneficial interest:

(1) Summit National Life Policy Number SN8904954U;

(2) John Hancock Life Policy Number 66808477; and

(3) John Hancock Life Policy Number 66858202.

g. 66.68% of the Starkey Employees Savings and Retirement Plan, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases, its proceeds, and any other rights related to the Starkey Employees Savings and Retirement Plan existing by reason of WILLIAM FRANKLIN AUSTIN'S past employment with Starkey Laboratories, Inc.

h. The Willowbend Polo & Hunt Club membership.

11. The allocation of debts between the parties is fair and equitable based on the division of the marital estate.

12. An equitable division of the estate of the parties is further achieved by ordering Petitioner to pay $400,000 in attorney's fees to Respondent's attorney.

13. The parties are entitled to a divorce because the Court finds the marriage has become insupportable because of discord or conflict of personalities that destroyed the legitimate ends of the marriage relationship and prevented any reasonable expectation of reconciliation.

SIGNED this 15th day of October, 1993.

/s/ BOB O'DONNELL

BOB O'DONNELL,
Judge Presiding
301st Judicial District Court
Dallas County, Texas

CERTIFICATE OF SERVICE

Pursuant to Rule 297 of the Texas Rules of Civil Procedure, a copy of the Court's findings and conclusions were mailed to the following counsel of record in this suit on October 15, 1993:

Harry L. Tindall
2800 Texas Commerce Tower
Houston, Texas 77002-3094

Kenneth D. Fuller
M.J. "Ike" Vanden Eykel
2311 Cedar Springs Rd., Suite 300
Dallas, Texas 75201

Kenneth G. Raggio
3316 Oak Grove Avenue, Suite 100
Dallas, Texas 75204

Toby R. Goodman
1600 E. Lamar Boulevard, Suite 115
Arlington, Texas 76011

Robert Eugene Smith
1555 S. Palm Canyon Drive, D-201
Palm Springs, California 92264

Mike Aranson
600 Jackson Street
Dallas, Texas 75202

/s/ BOB O'DONNELL
BOB O'DONNELL, Judge
Presiding
301st Judicial District Court
Dallas County, Texas

In the Matter of Roy Stewart NUNNALLY, Bankrupt.

Mary Elizabeth NUNNALLY, Appellant-Cross Appellee.

v.

Roy Stewart NUNNALLY, Appellee-Cross Appellant.

No. 74-1361.

United States Court of Appeals,
Fifth Circuit.
Jan. 8, 1975.
Rehearing and Rehearing En Banc
Denied Feb. 13, 1975.

In a proceeding on a voluntary petition in bankruptcy, the referee found that the bankrupt's navy retirement benefits becoming due after the filing of the voluntary petition were not property passing to the trustee in bankruptcy and that an award to bankrupt's former wife during their divorce proceedings was a dischargeable debt, the United States District Court for the Western District of Texas, at Austin, Jack Roberts, J., affirmed, and bankrupt and his former wife appealed. The Court of Appeals. Gee, Circuit Judge, held that the retirement benefits did not pass to the trustee, that the debt to the former wife was nondischargeable as representing alimony, that the attorney's fees awarded during the divorce proceedings were likewise protected from discharge, and that the bankrupt's interest in the cash surrender value of certain life policies was not exempt from creditors.

Affirmed in part, reversed in part.

1. Bankruptcy Key 143(1)

Bankrupt's navy retirement benefits becoming due after filing of voluntary petition were not property passing to

trustee in bankruptcy. Bankr.Act. § 70. sub. a(5). 11 U.S.C.A. § 110(a)(5): 38 U.S.C.A. § 454a: Social Security Act. § 207, 42 U.S.C.A. § 407; Railroad Retirement Act of 1937. § 12, 45 U.S.C.A. § 228l.

2. Bankruptcy Key 421(5)

Amount awarded to bankrupt's ex-wife during divorce proceedings as advance to community from her separate estate was nondischargeable debt. V.T.C.A., Family Code § 3.63: Bankr.Act, §§ 14, sub. c. 17, subs. a. a(7), 11 U.S.C.A. §§ 32(c), 35(a), (a)(7).

3. Divorce Key 231

Under Texas law, award to wife in divorce proceedings of sum representing advance to community from her separate estate did not constitute award of permanent alimony where sum was fixed, no periodic payments for indefinite period of time were ordered and it was clear that there was property on hand to satisfy the debt.

4. Bankruptcy Key 421(5)

Attorney's fees awarded to former wife during divorce proceedings constituted nondischargeable debt of bankrupt. Bankr.Act, §§ 14. sub. c. 17. subs. a. a(7). 11 U.S.C.A. §§ 32(c). 35(a). (a)(7).

5. Bankruptcy Key 396(3)

Bankrupt's interest in cash surrender value of life policies as to which bankrupt's mother and children were beneficiaries was not exempt from creditors under Texas law where children were only contingent beneficiaries and bankrupt had failed to show himself legally or morally bound to support mother or her actual dependence on him. Bankr.Act, § 70, sub. a(5). 11 U.S.C.A. § 110(a)(5): Vernon's Ann.Tex.Civ.St. arts. 3832a, 3836.

Gerard P. Nugent, Austin, Tex., for appellant-cross appellee.

E.O. Rinehart, Jr., Austin. Tex., for appellee-cross appellant.

Before DYER, SIMPSON and GEE, Circuit Judges.

GEE, Circuit Judge:

In October 1972, Roy Stewart Nunnally filed a voluntary petition in bankruptcy. His principal creditor and the one pursuing this appeal is his former wife, Mary Elizabeth Nunnally, whose claim stems from earlier divorce proceedings. In granting divorce, the court had divided the separate and community property between the spouses under the authority of Section 3.63 of the Texas Family Code, V.T.C.A. In addition to various items of personal property and title to real estate. Mary Elizabeth Nunnally was awarded 60% of certain life insurance policies. $46,779.41 representing an advance to the community from her separate estate, and $5,000 in attorney's fees incurred as a result of the divorce proceedings. The trial court granted Mrs. Nunnally a lien on Roy Nunnally's remaining interests in his Navy retirement benefits to secure the $46,779.41[1]

A few months later Nunnally's petition in bankruptcy presented Mrs. Nunnally with the possibility that parts of the divorce decree might be rendered of little worth. Those fears were reinforced by the bankruptcy referee's decision and the district court's affirmance. The referee found that the Navy retirement benefits becoming due after the filing of the voluntary petition in bankruptcy were not property passing to the trustee in bankruptcy. Further, he held that the $41,779.41 was a dischargeable debt, as was the award of attorney's fees.

[1] The trial court gave 48% of the Navy retirement pension payments to Mrs. Nunnally. Fifty-two percent was awarded to Mr. Nunnally.

Mrs. Nunnally's application for a stay of the bankruptcy proceedings to permit her to proceed in state court to enforce her lien against the Navy retirement pension was denied. Mrs. Nunnally appeals these decisions while Mr. Nunnally complains of the referee's finding that the life insurance policies were not exempt from creditors under Vernon's Tex.Rev.Civ.Stat.Ann. art. 3832a.

[1] Under Section 70a(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5), the trustee of the bankrupt's estate is vested on appointment with title to all property of the bankrupt which could have been transferred by the bankrupt or which could have been levied upon prior to the filing of the petition in bankruptcy. This provision is a broad one, covering vested rights in property, both of corporeal and incorporeal nature. 1A Collier Bankruptcy Manual ₱ 70.11 at 946 (2d ed. rev. I. Hall & R.D. Agostino 1974) [hereinafter cited as Collier]. It is too late in the day to find that vested interests in retirement pensions are not property rights. Texas divorce courts so regard them. *Busby v. Busby*, 457 S.W.2d 551 (Tex.1970), and by implication the federal government does also. For example, specific federal legislation exempts benefits due under laws administered by the Veterans' Administration from attachment, levy or seizure. 38 U.S.C. § 3101. Similar exemptions exist for railroad retirement benefits,[2] social security payments,[3] and military retired pay annuities.[4] These federal exemptions are of no benefit to the bankrupt in this case. Exemption is a matter of federal or state legislative grace. Either through legislative oversight or through intentional deletion. Congress has failed to provide that Navy

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[2] 45 U.S.C. § 228A.

[3] 42 U.S.C. § 407.

[4] 10 U.S.C. § 1440.

retirement pensions are free from levy and attachment.[5] Nor is it provided by statute that pensions are not transferable. *See Segal v. Rochelle,* 382 U.S. 375, 381-385, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966).

One argument remains for the bankrupt. Some interests, though "property," do not pass to the trustee for purposes of Section 70a(5). *Lines v. Frederick,* 400 U.S. 18. 91 S.Ct. 113, 27 L. Ed.2d 124 (1970). The pertinent considerations derive from the Bankruptcy Act itself. Section 70a(5) is defined to benefit creditors by transferring to the trustee everything the bankrupt has of value. Even if the interest is contingent or subject to postponed enjoyment, it may pass to the trustee. The interest must be "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70a(5)." *Kokoszka v. Belford,* 417 U.S. 642, 94 S.Ct. 2431, 2434, 41 L.Ed.2d 374, 379 (1974): *Segal v. Rochelle,* 382 U.S. 375, 379-380, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966). On the other hand, if the interest is "designed to function as a wage-substitute at some *future* period and, during that *future* period, to 'support the basic requirements of life for' " [the debtor], *Kokoszka, supra,* 417 U.S. at 648, 94 S.Ct. at 2435, 41 L.Ed.2d at 380, and removal of the interest would hamper the bankrupt's efforts to make a new start, the property does not pass to the trustee. The pension payments here fall in the second category; they are periodic payments made during a time when the pensioner may well have no or few other sources of income.

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[5] The bankrupt can only point to former 38 U.S.C. § 454a as authority for exemption. 1 Collier 76.07 at C-13. This section is no longer in the United States Code: however, the corresponding provision in the present code is 38 U.S.C. § 3101. This section applies only to benefits rendered under laws administered by the Veterans' Administration, a requisite missing here.

[2,3] Next, we treat the matter of whether the $41,779.41 awarded by the divorce court to Mrs. Nunally was a dischargeable debt. All debts are dischargeable unless they are subject to the objections set out in Section 14c, 11 U.S.C. § 32(c) of the Act, 1 Collier ¶ 14.00 .02, or are exempt under Section 17. 11 U.S.C. § 35(a). 11 U.S.C. § 35(a)(7) provides:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child. . . .

Although there is no permanent alimony in Texas, *Francis v. Francis,* 412 S.W.2d 29, 32 (Tex.1967), the divorce court is authorized at the time of the divorce to divide the separate and community property between the spouses in whatever manner the court deems equitable and just. Tex. Family Code Ann. § 3.63. Factors which the Texas courts may take into account in making the division and award "include the disparity of the *earning power* of the parties, as well as their business opportunities . . . the physical condition of the parties, probable *future need for support,* and educational background: . . . [t]he fault in breaking up the marriage and the benefits innocent spouse would have received from a *continuation* of the marriage . . ." *Cooper v. Cooper.* 513 S.W.2d 229, 233-234 (Tex.Civ.App. — Houston [1st Dist.] 1974. *writ history unknown*) (emphasis added). *See also Keton v. Clark,* 67 S.W.2d 437 (Tex.Civ.App. — Waco 1933, *writ ref'd*). Thus, it is clear support in the future can play a significant role in the divorce court's property division and that what may appear to be a mere division of assets may in fact, under a Texas decree, contain a substantial element of alimony-substitute, support or maintenance, however termed. The Texas Supreme Court has recognized that: "Support payments ordered to be made after divorce from the income

from the husband's property, although considered alimony in many jurisdictions, is not considered alimony in this State." *Francis v. Francis,* 412 S.W.2d 29, 32-33 (Tex.1967). So recognizing, we should not be bound by the label which the state places on a decree; we must look to its substance. Here the award of $41,779.41 falls within the exception from discharge in Section 17.[6]

[4] As for the attorney's fees awarded in the divorce proceedings, they are also protected from discharge. Courts have held attorney's fees nondischargable when awarded under a state statue allowing such fees as "alimony."[7] It is

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[6] Bankrupt contends that we cannot find the $41,779.41 an award for support since it would then be void under Texas law as permanent alimony. In order for the order to be valid, he says we must find a debt — a dischargeable one. Although it is doubtful that this is a proper forum for bankrupt to attack the divorce decree collaterally, bankrupt's argument founders on Texas case law. In Texas, permanent alimony is defined as "those payments imposed by a court order or decree on the husband as a personal obligation for support and maintenance of the wife after a final decree of divorce." *Francis v. Francis,* 412 S.W.2d 29, 38, (Tex.1967). However, Texas courts are not quick to find that permanent alimony has been ordered, and we are *Erie*-bound to follow in their tracks. If the payments ordered are "referable to any property which either spouse may have owned or claimed," the award is valid. *McBean v. McBean,* 371 S.W.2d 930, 932 (Tex.Civ.App. — Waco 1963, *writ history unknown*). In *McBean,* the Waco Court of Civil Appeals held that requiring the husband to pay $100 per month to the wife for her life or until she remarried was valid as an offer against the community property awarded the husband. *See also Zaruba v. Zaruba,* 498 S.W.2d (395, 700 (Tex.Civ.App. — Corpus Christi 1973. *writ dism'd*); *Gent v. Gmenier,* 435 S.W.2d 203 (Tex.Civ.App. — Waco 1963, *no writ*); *Bunker v. Bunker,* 236 S.W.2d 731 (Tex.Civ.App. — San Antonio 1960, *writ dism'd*). The divorce court here stated specifically that Mrs. Nunnally was entitled to restoration of her separate *property* — $41,779.41. The sum was fixed: no periodic payments for an indefinite period of time were ordered. Mr. Nunnally received, among other items, 52% of his Navy retirement benefits. These benefits were valued at $332.000 in the voluntary petition for bankruptcy, so it is clear that there was property on hand, in Texas divorce court terms, to satisfy the debt. The cash award was made in lieu of granting Mrs. Nunnally additional property in kind. We do not think that the divorce decree suffers from the infirmity bankrupt presses upon us.

[7] See 1 Collier ¶ 17.04 at 219.

true that there is no statutory authority here; however, the Texas Supreme Court has based the award of attorney's fees on the same factors which guide the divorce court in dividing the property on hand between the spouses. "The attorney's fee is but a factor to be considered by the court in making an equitable division of the estate, considering the conditions and needs of the parties and all of the surrounding circumstances." *Carle v. Carle,* 149 Tex. 469. 234 S.W.2d 1002, 1005 (Tex.1950).[8] When put on those grounds, attorney's fees are indistinguishable from other parts of the divorce decree. They cannot be discharged. Since these debts cannot be discharged, the matter of a stay is moot.

[5] As a final matter, bankrupt contends that his interest in the cash surrender value of six life insurance policies is exempt from creditors by virtue of Tex.Rev.Civ.Stat.Ann. art. 3832a.[9] That statute provided:

> The cash surrender value of any life insurance policy which has been in force more than two years, shall be exempt from liability for any debt, and shall not be subject to forced sale, or other process to satisfy any

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[8] This holding has been held to survive the enactment of the 1968 Texas Family Code. *In re marriage of Jackson,* 506 S.W.2d 261. 268-269 (Tex.Civ.App. — Amarillo 1974, *writ dism'd*).

[9] This statute was repealed effective January 1, 1974. However, it is preserved in Tex.Rev.Civ.Stat.Ann. art. 2830, pertinent sections of which are set out below:

Art. 3836. [3785] [2395] [2335] Personal property exempt from satisfaction of liabilities.

(a) Personal property (not to exceed an aggregate fair market value of $15,000 for each single, adult person, not a constituent of a family, or $30,000 for a family) is exempt from attachment, execution and every type of seizure for the satisfaction of liabilities, except for encumbrances properly fixed thereon, if included among the following:

* * * * *

(6) the cash surrender value of any life insurance policy in force for more than two years to the extent that a member or members of the family of the insured person or a dependent or dependents of a single, adult person, not a constituent of a family, is beneficiary thereof: . . .

> debt, provided a member or members of the family of the insured are the beneficiaries under such policy, and in event they are only partially the beneficiaries then such policies shall be so exempt to the extent of their beneficiary interest. This act shall not apply to debts arising under the policy nor to debts secured by lawful assignment of the policy.

Under Texas law interpreting the meaning of "family" for purposes of personal property and homestead exemptions, adult children other than unmarried daughters are not part of the family unit. *Givens v. Hudson,* 64 Tex. 471 (1885). In order for the mother to be regarded as a member of her adult son's family, there must be a legal or moral obligation to support on the part of one person, with corresponding dependency on the part of the other person. *Stout v. Anthony,* 254 S.W.2d 879 (Tex.Civ.App. — Amarillo, 1952, *writ ref'd*). Bankrupt has not shown himself legally or morally bound to support his mother. Likewise, he has not shown her dependence on him. *Stout v. Anthony, supra. L. E. Whitham & Co. v. Briggs' Estate.* 58 S.W.2d 49 (Tex.Comm'n App.1933, *holding approved*). *Cf. Henry S. Miller Co. v. Shoaf,* 434 S.W.2d 243 (Tex.Civ.App. — Eastland 1968, *writ ref. n. r. e.*).

The fact that bankrupt's children are contingent beneficiaries on the policies does not change our holding that the cash surrender values of the policies are not exempt. The statute speaks in terms of beneficiaries, not contingent beneficiaries. Moreover, we decline to adopt an interpretation of the statute which would allow a bankrupt — by the device of making family members fourth or fifth contingency beneficiaries, for example — to insulate assets from creditors when there may be only a very slight chance that members of the family unit or dependents will ultimately benefit. This would not further the aims of the statute.

Affirmed in part, reversed in part.

Mary Frances ERSPAN, Plaintiff-Appellee Cross-Appellant,

v.

Lloyd J. BADGETT, Defendant-Appellant Cross-Appellee.

No. 79-4011.

United States Court of Appeals,
Fifth Circuit.
Unit A

June 10, 1961.
Rehearing En Banc Denied Oct. 9, 1981.

Divorced wife sued former husband to enforce terms of Texas divorce decree awarding her one half of defendant's accumulated rights under United States Army retirement benefits program. The United States District Court for the Western District of Texas, William S. Sessions, Chief Judge, rendered judgment for plaintiff and enjoined defendant from proceeding with civil contempt action against plaintiff in Missouri district court from which he had obtained a discharge in bankruptcy, and husband appealed. The Court of Appeals, Sam D. Johnson, Circuit Judge, held that: (1) abstention on ground that matter involved domestic relations issue was not required; (2) although alimony after divorce is not permitted in Texas, finding that wife's right to share of retirement benefits was nondischargeable as containing an element of alimony substitute, support or maintenance was not clearly erroneous; and (3) District Court was not without jurisdiction to enjoin husband from proceeding against wife for civil contempt in the bankruptcy court.

Affirmed.

1. Federal Courts Key 47

It is neither necessary nor appropriate for federal courts to abstain in every case involving domestic relations questions.

2. Federal Courts Key 47

District court did not err in asserting jurisdiction in diversity action to enforce terms of Texas divorce decree awarding plaintiff former wife one half of defendant former husband's accumulated right under United States Army retirement benefits program as case essentially involved questions of interpretation of federal bankruptcy laws and of proper relationship between a bankruptcy court and other federal courts. 28 U.S.C.A. § 1332.

3. Divorce Key 261

Divorced husband could not be heard to argue that he could not comply with district court order that he maintain with the United States Army an allotment in favor of his wife for one half of future retirement benefits, which had been awarded wife by Texas divorce court, because the Army does not allow allotments where Department of Army had advised that pay manual had been amended to permit retired military members to authorize allotments to former spouses and there was no showing that husband had ever attempted to secure such allotment.

4. Bankruptcy Key 421(5)

Although alimony after divorce is not permitted in Texas, divorced wife's right to share of former husband's military retirement benefits awarded her by Texas divorce court was nondischargeable under Bankruptcy Act as "alimony"; divorce award contained an element of alimony-substitute,

support or maintenance, however termed. Bankr.Act. § 17(a)(7), 11 U.S.C.A. § 35(a)(7).

See publication *Words and Phrases* for other judicial constructions and definitions.

5. Bankruptcy Key 3
Constitutional Law Key 224(2)

Provision of Bankruptcy Act exempting from discharge an obligation for alimony due or to become due or for maintenance or support of the "wife" is not unconstitutional on equal protection grounds; sex-based distinction is remedied by extending benefits to the excluded class, *i.e.*, former husbands. Bankr.Act. § 17(a)(7), 11 U.S.C.A. § 35(a)(7); U.S.C.A.Const. Amend. 14.

6. Divorce Key 261

Since former husband's discharge in bankruptcy did not bar former wife from litigating issue of nondischargeability of Texas divorce court's award of one half of husband's accumulated right under army retirement benefits program, husband's instituting contempt proceedings against wife in bankruptcy court was nothing more than an attempt to relitigate district court's determination, in wife's action to enforce decree, of nondischargeability and district court did not act in excess of its jurisdiction in enjoining husband from proceeding with contempt action, especially as husband had not moved bankruptcy court for a determination of dischargeability. Bankr.Act, §§ 14(f)(2), 17(a)(2, 7), (c)(4), 11 U.S.C.A. §§ 32(f)(2), 35(a)(2, 7), (c)(4); Rules Bankr. Proc. Rules 401(e), 409(a)(1), 11 U.S.C.A.; 28 U.S.C.A. § 1652.

Stephen F. Hefner, Sherman, Tex., for defendant-appellant cross-appellee.

Colbert N. Coldwell, El Paso, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Western District of Texas.

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

SAM D. JOHNSON, Circuit Judge:

This is an action to enforce the terms of a 1963 divorce decree that awarded to plaintiff one-half of defendant's accumulated right under a United States Army retirement benefits program. Following a non-jury trial, the district court awarded plaintiff accrued and unpaid benefits in the amount of $34,641.90 plus interest from the date of judgment, and ordered defendant to maintain with the United States Army an allotment order providing for the payment directly to plaintiff of her one-half share of all future payments to which she is entitled. The district court also permanently enjoined defendant from proceeding with his civil contempt action against plaintiff in the United States District Court for the Eastern District of Missouri, Southeastern Division, the court from which defendant obtained a discharge in bankruptcy in 1973. The judgment of the district court is affirmed.

I.

Plaintiff and defendant were divorced in 1963. The divorce decree, which was rendered in the state district court in El Paso, Texas, provided in part that defendant's accumulated right to United States Army retirement benefits was community property, and, as such, was the joint property of plaintiff and defendant upon divorce. The decree ordered

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* District Judge of the Western District of Louisiana, sitting by designation.

defendant to execute all documents necessary to accomplish the payment directly to plaintiff of her one-half share of each payment made after defendant's retirement from the Army, and provided that defendant was personally responsible to plaintiff for such payments in the event that they could not be made directly to her by the Army.

Shortly after the divorce, defendant retired from the Army. He paid to plaintiff one-half of his military retirement benefits from the date of his retirement through March 1967; he has paid nothing to plaintiff since that time. In 1971, plaintiff obtained a judgment against defendant for accrued benefits due her in the amount of $8,606.28. The judgment was entered by the state district court in Denton County, Texas. This judgment was affirmed by the Texas Court of Civil Appeals in *Badgett v. Erspan*, 476 S.W.2d 381 (Tex.Civ.App. — Fort Worth 1972, *no writ*), but defendant has not paid it. No execution has ever been requested or issued on the Denton County judgment.

In 1972, defendant filed a petition in bankruptcy in the United States District Court for the Eastern District of Missouri, Southeastern Division. He listed among his debts plaintiff's 1971 Denton County judgment as well as the El Paso divorce decree. Plaintiff received notice of the petition in bankruptcy, but filed no claim in the bankruptcy proceedings, and did not object to the discharge in bankruptcy that defendant obtained thereby.

Jurisdiction in the case *sub judice* is predicated upon diversity of citizenship, 28 U.S.C. § 1382. Plaintiff seeks from defendant her share of the retirement benefits paid by the government to defendant, but not forwarded to her, since June 10, 1967, the date of the Denton County judgment. Plaintiff also seeks an order that will ensure her ability to receive future retirement benefits to which she is entitled. In response, defendant argues that his 1973 discharge in bank-

ruptcy absolved him of any liability to plaintiff for either past or future retirement benefits.

Following submission of the instant case to the federal district court, defendant instituted contempt proceedings against plaintiff in the Missouri bankruptcy court from which he obtained his discharge, alleging that, by bringing the present action, plaintiff had violated an injunction that arose by operation of law from defendant's discharge in bankruptcy. The federal district court in the present case temporarily enjoined defendant from prosecuting the Missouri contempt proceeding, and subsequently held that defendant's discharge in bankruptcy did not affect his liability to plaintiff for either past or future retirement benefits. Consequently the court ordered defendant to pay to plaintiff $34,641.90 plus interest, which represents one-half of the benefits accrued from June 10, 1971, to the date of the federal district court's judgment herein. The court also ordered defendant to execute and keep in full force and effect with the United States Army an allotment order directing the Army to pay directly to plaintiff one-half of all future retirement benefits. Finally, the district court entered a permanent injunction preventing defendant from proceeding with his contempt action in the Missouri bankruptcy court.

[1-3] On appeal, defendant argues (1) that the federal district court erred in holding that his 1973 discharge in bankruptcy did not extinguish plaintiff's claim to one-half of defendant's military retirement benefits, (2) that even if the obligation to plaintiff was exempt from discharge under former section 17(a)(7) of the Bankruptcy Act, that provision is unconstitutional on equal protection grounds, and (3) that the district court erred in enjoining defendant from proceeding in the bankruptcy court because that court has jurisdiction to determine dischargeability. Although defendant challenges on appeal the district court's determination that his discharge did

not extinguish plaintiff's right to her share of the retirement benefits, he elected not to appeal the district court's award of $34,641.90 representing her share of benefits that defendant already has received.[1]

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[1] Defendant raises two additional arguments. First, he asserts that under the "domestic relations" theory of federal abstention, the district court should have refused to assert jurisdiction in this case. In *Crouch v. Crouch*, 566 F.2d 486 (5th Cir. 1978), this Court stated the rule that:

> Federal courts have traditionally refused to exercise diversity jurisdiction in a variety of domestic relations cases, including suits for divorce and alimony, . . . and actions to enforce separation or divorce decrees still subject to state court modification. The reasons for federal abstention in these cases are apparent: the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.

566 F.2d at 487 (citations omitted). The Court, however, recognized that it is neither necessary nor appropriate for federal courts to abstain in every case involving domestic relations questions:

> While we approvingly acknowledge the so-called domestic relations exception to diversity jurisdiction, we find it inapplicable to the instant case, which involves little more than a private contract to pay money between parties long since divorced . . . . We are faced here with no questions of custody or parental rights, no pending state court action or agreement to litigate in state court, and no threat that the former spouses will seek to play one court system off against the other. Nor do we perceive any strong state interest in the adjudication of this suit or any special competence on the part of state courts, other than their superior ability to interpret state law, which is always present in diversity suits. Because none of the rationales for the domestic relations exception obtained in this case — with the possible exception of congested federal dockets — we uphold the district court's exercise of jurisdiction and proceed to determine the merits.

Id. at 487-88 (citations omitted; footnote omitted). As in *Crouch*, the case *sub judice* involves none of the concerns upon which the domestic relations exception rests. Indeed, as developed *infra*, this case essentially involves questions of interpretation of the federal bankruptcy laws and of the proper relationship between a bankruptcy court and other federal courts. Consequently, the district court did not err in asserting jurisdiction in this case.

Defendant also argues that he cannot comply with the district court's order that he maintain with the United States Army an allotment in favor of his wife for one-half of all future retirement benefits because the Army does not allow allotments in these circumstances. Defendant persists in this argument despite the fact that the

II.

Section 17(a)(7) of the Bankruptcy Act of 1938,[2] former 11 U.S.C. § 35(a)(7), provided in part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child . . . .

In *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975), this Court explored the relationship between Texas community property law, military retirement benefits, and section 17(a)(7). In that case, the former wife was awarded in the divorce proceeding, *inter alia*, a lien upon her ex-husband's Navy retirement benefits to secure payment of $46,779.41 which represented an advance to the community from her separate estate. Shortly thereafter, the ex-husband filed a petition in bankruptcy, and both the bankruptcy referee and the district court determined that the former wife's right to the retirement benefits was a dischargeable debt. On appeal, the issue presented to this Court was whether the former wife's right to the $46,779.41 awarded by the divorce court, and secured by the lien on the retirement benefits, was a dischargeable debt, or whether it was exempt from discharge under section 17(a)(7). This Court, although recognizing that

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Office of the Judge Advocate General, Department of the Army, by letter of May 23, 1980, informed counsel for both parties that the Department of Defense Military Pay and Allowances Entitlements Manual was amended on December 19, 1977, to permit retired military members to authorize allotments to former spouses. It does not appear from the record that defendant has ever attempted to secure such an allotment. Absent a showing that defendant attempted to secure such an allotment, and that such an application was rejected by the Army, defendant's attack on the district court's order cannot be sustained.

[2] Defendant's bankruptcy proceedings were conducted prior to the effective date of the Bankruptcy Reform Act of 1978. 11 U.S.C. § 101, *et sec.*

alimony after divorce is not permitted in Texas, *Francis v. Francis,* 412 S.W.2d 29, 32 (Tex.1967), also noted that under the scheme of the Texas Family Code, a divorce court is authorized to divide the separate and community property between the parties in a just and equitable manner, and that

> [f]actors which the Texas courts may take into account in making the division and award "include the disparity of the *earning power* of the parties as well as their business opportunities .... the physical conditions of the parties, probable *future need for support,* and educational background; ... [t]he fault in breaking up the marriage and the benefits [the] innocent spouse would have received from a *continuation* of the marriage ....

506 F.2d at 1026, (emphasis in original), quoting *Cooper v. Cooper,* 513 S.W.2d 229, 233-34 (Tex.Civ.App. — Houston [1st Dist.] 1974, *no writ*). The Court also observed that, under Texas law, the future support of a former spouse "can play a significant role in the divorce court's property division and that what may appear to be a mere division of assets may in fact, under a Texas decree, contain a substantial element of alimony-substitute, support or maintenance, however, termed," 506 F.2d at 624. Finally, this Court noted that the Texas Supreme Court has recognized that support payments, although considered alimony in other states, are not so characterized in Texas. *See Francis v. Francis,* 412 S.W.2d at 82-38. Consequently, this Court determined that, for purposes of interpreting the federal bankruptcy laws, a federal court is not bound by the label that a state attaches to an award, but rather must look to its substance, and held that the award fell within the exception from discharge contained in section 17(a)(7). 506 F.2d at 1027.

Relying upon *Nunnally,* the district court in the case *sub judice* held that plaintiff's right to her share of defendant's

retirement benefits was a nondischargeable obligation for "alimony due or to become due, or for maintenance or support" under section 17(a)(7). In *Matter of Crist,* 632 F.2d 1226 (5th Cir. 1980), which also involved the question of nondischargeability under section 17(a)(7), this Court stated:

> Under the relevant standard of review, findings of fact are not to be disturbed unless clearly erroneous. "The test . . . is not whether a different conclusion from the evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings."

quoting *Matter of Bardwell,* 610 F.2d 228, 230 (5th Cir. 1980).

Defendant argues that, although correct at the time it was decided, *Nunnally* has been undermined by subsequent decisions holding that, for purposes of the federal government's consent to suit, a division of military retirement benefits in a Texas decree is not "alimony" within the meaning of the Social Security Act, 42 U.S.C. §§ 659, 662(c). *See United States v. Stalter,* 567 S.W.2d 797 (Tex.1978); *see also Marin v. Hatfield,* 546 F.2d 1230 (5th Cir. 1977). Defendant's reliance upon the principle espoused in *Stalter* and *Marin* is misplaced. First, it is significant that neither decision involves the Bankruptcy Act; moreover, in neither decision did the Court mention, much less disapprove, this Court's decision in *Nunnally.*

[4] Of more substance is the fact that the rule expressed in *Stalter* and *Marin* is inapposite to the question presented in *Nunnally* and in the case *sub judice.* In *Stalter* and *Marin* the courts held that, for purposes of determining the extent of the federal government's consent to suit, military retirement benefits awarded under a Texas decree are not "alimony" under Texas law. In *Nunnally,* however, this Court addressed the

separate and distinct question of whether, for purposes of applying the federal bankruptcy laws, such benefits, although not "alimony" under state law, nonetheless may contain a substantial element of "alimony-substitute, support or maintenance, however termed." 506 F.2d at 1024.[3] The Court's affirmative answer in *Nunnally* is supported both by reason and precedent. In *Matter of Crist*, 682 F.2d at 1232, this Court reiterated the well-established policy of "liberal construction of the Bankruptcy Act in light of the purpose of the provision under consideration." Also in *Crist*, this Court stated the purpose underlying section 17(a)(7) as follows:

> "The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and will not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce."

682 F.2d at 1233; quoting *Wetmore v. Markoe*, 196 U.S. 68, 24 S.Ct. 172, 175, 176, 49 L.Ed. 890 (1904). The essence of this Court's decision in *Nunnally* is that, regardless of how a state may choose to define "alimony," a federal court, for purposes of applying the federal bankruptcy laws, is not bound to the label that a state affixes to an award, and that, consistent with the objectives of federal bankruptcy policy, the substance of the award must govern. 506 F.2d at 1027. In the present case, as in *Nunnally*, the award contains an element of "alimony substitute, support or maintenance, however termed." 506 F.2d at 1024. Consequently, the district court's finding that plaintiff's right to her share of defendant's

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[3] This reasoning also distinguishes *Harbour v. Harbour*, 590 S.W.2d 828 (Tex.Civ.App. — Houston [14th Dist.] 1979). In any event, contrary to defendant's assertion, the court in *Harbour* did not reject *Nunnally*, but rather held that plaintiff in that case failed to prove that the lump sum award of $25,000 was in the nature of alimony, support or maintenance.

retirement benefits was nondischargeable under section 17(a)(7) is not clearly erroneous, and must be affirmed.

III.

[5] By way of alternative argument, defendant asserts that even if the section 17(a)(7) exemption from discharge applies to the award in this case, that statute nonetheless is unconstitutional, and an exemption from discharge should not be recognized. Defendant argues that section 17(a)(7) creates a gender-based classification in violation of the equal protection component of the fifth amendment because it exempts from discharge only those obligations "for alimony due or to become due, or for maintenance or support of *wife* or child . . . ." (emphasis added). This argument was raised in *Matter of Crist,* 632 F.2d 1226 (5th Cir. 1980). In *Crist* this Court acknowledged that the sex-based classification contained in section 17(a)(7) was constitutionally infirm, but held that the appropriate remedy was not to strike down the entire statute, but rather to extend the benefits of section 17(a)(7) to the excluded class, *i.e.,* to allow both former husbands and wives receiving alimony or maintenance or support to assert the non-dischargeability of the ex-spouse's obligation under section 17(a)(7). Consequently, defendant's argument to the contrary must be rejected.

IV.

[6] Finally, defendant, argues that because a bankruptcy court has jurisdiction to determine the dischargeability of a debt, the district court in the case *sub judice* erred in permanently enjoining defendant from proceeding against plaintiff for civil contempt in the Missouri bankruptcy court. This argument cannot be sustained. Although subsection 17(a)(2) of the former Bankruptcy Act enumerated certain categories

of debts for which dischargeability could be determined only in the bankruptcy court, and section 14(f)(2) provided for an injunction against proceedings in other courts to enforce those obligations, the 1970 amendments to the Act moved claims for alimony, maintenance and support from subsection 17(a)(2) to 17(a)(7), and thereby provided that, with regard to those claims, the bankruptcy court possessed only concurrent jurisdiction with other courts and no injunction prevented the subsequent assertion of those claims. *See* 1A Collier on Bankruptcy ¶¶ 14.69, 17.01, 17.18, 17.22A (14th ed.).[4] Inasmuch as defendant's discharge did not operate to enjoin plaintiff from litigating the issue of nondischargeability under section 17(a)(7) in the present action, defendant's civil contempt proceeding in the bankruptcy court constituted nothing more than an attempt to relitigate the district court's determination of nondischargeability in that forum. Consequently, once the district court in the case *sub judice* determined that defendant's obligation to plaintiff was not dischargeable, the court properly acted to prevent the relitigation of that issue in the bankruptcy court.[5] 28 U.S.C. § 1652;

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[4] Although defendant could have moved the bankruptcy court, pursuant to Rule 409(a)(1) of the Rules of Bankruptcy Procedure, for a determination of the dischargeability of plaintiff's claim to her share of the retirement benefits, and thereby obtained the injunctive relief authorized by section 17(c)(4) and Rule 401(e) of the Rules of Bankruptcy Procedure, he chose not to do so. *See* 12 Collier on Bankruptcy ¶ 401.7 (14th ed.).

[5] Defendant's motion in the Missouri bankruptcy court alleged that plaintiff's claim in the present case was for property wrongfully converted, a claim under section 17(a)(2) and therefor subject to the section 14(f)(2) injunction. Although plaintiff's complaint in the case *sub judice* indeed does contain an alternative claim grounded upon a theory of conversion, plaintiff's principal claim, and the theory upon which this case was tried and decided by the district court, was that of nondischargeability under section 17(a)(7). Having determined that plaintiff's claim indeed is nondischargeable as one for alimony, maintenance, or support under section 17(a)(7), and not one for conversion, the district court's injunction did not intrude upon the bankruptcy court's exclusive jurisdiction to determine nondischargeability of claims under section 17(a)(2).

see Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1222 (5th Cir. 1976). Consequently, the district court did not err in enjoining defendant from proceeding against plaintiff in the bankruptcy court.

AFFIRMED.

Anna Goldlusteva FRANCIS, Petitioner,

v.

Garnet P. FRANCIS, Jr., Respondent.

No. A-11768.

Supreme Court of Texas.

March 1, 1967.

Rehearing Denied March 29, 1967.

Suit for declaratory judgment to set aside portion of property settlement agreement by parties to divorce action. The District Court, El Paso County, Hans E. Brockmoller, J., rendered judgment for the wife and the husband appealed. The El Paso Court of Civil Appeals of the Eighth Supreme Judicial District, 407 S.W.2d 295, reversed and rendered judgment and the wife brought error. The Supreme Court, Calvert, C. J., held that judgment in divorce action which recited that parties had arrived at community property settlement agreement which court had found to be fair and reasonable and that court ordered it approved and filed merely approved property settlement agreement which parties themselves had made by which husband was obligated after divorce to pay wife $15,000 in installments, and judgment which did not purport to order husband to pay the sum of $15,000 did not have effect of ordering, contrary to public policy of Texas, the payment of alimony.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

1. Divorce Key 209, 231

To constitute "alimony" the allowance to or provision for wife's support, whether during pendency of suit, during

divorce from bed and board, or after an absolute divorce, must have been made by judgment or decree of court.

See publication *Words and Phrases* for other judicial constructions and definitions.

2. Divorce Key 209, 231

A mere contractual obligation of husband to make future periodic or lump sum payments for support and maintenance of his wife is not a provision for "alimony".

3. Divorce Key 234

Statutes and public policy of Texas do not sanction alimony for wife after judgment of divorce has been entered. Vernon's Ann.Civ.St. arts. 2328b-1, § 2(6), 2328b-3, § 7, 4637.

4. Divorce Key 231

In Texas, "alimony" is an allowance for support and sustenance of wife, periodic or in gross, which court orders husband to pay, only until final decree is made in case. Vernon's Ann.Civ.St. art. 4637.

5. Divorce Key 231

Support payments ordered to be made after divorce from income from husband's property is not considered "alimony" in Texas.

6. Divorce Key 234

Alimony which contravenes public policy of Texas is payment imposed by court order or decree on husband as a personal obligation for support and sustenance of wife after final decree of divorce. Vernon's Ann.Civ.St. arts. 2328b-1, § 2(6), 2328b-3, § 7, 4637.

7. Divorce Key 234

Obligations assumed by husband in separation agreements or contracts to make payments for support of wife after divorce decree becomes final not obligations to pay "alimony" and do not violate public policy of Texas. Vernon's Ann.Civ.St. arts. 2328b-1, § 2(6), 2328b-3, § 7, 4637.

8. Husband and Wife Key 278(2)

Former husband's contractual obligation in property settlement agreement to pay in installments to former wife $15,000, which included payment of $7,500 regardless of marital status of wife and payment of remaining $7,500 if wife remained unmarried, and promissory note evidencing obligation were not void as being in violation of public policy of State which does not sanction alimony for wife after judgment of divorce has been entered. Vernon's Ann.Civ.St. arts. 2328b-1, § 2(6), 2328b-3, § 7,4637.

9. Divorce Key 252

It is not purpose of statute directing court to order a division of estate of parties to divorce action to proscribe amicable division and settlement by the parties. Vernon's Ann.Civ.St. art. 4638.

10. Husband and Wife Key 278(1)

If as part of property settlement the parties to divorce action agree that husband will make support payments to wife after divorce is granted, court approval of agreement should not be held to invalidate it as alimony. Vernon's Ann.Civ.St. art. 4638.

11. Husband and Wife Key 278(1)

Amicable settlement by parties of their property rights in divorce action should be encouraged and the agreement will then have whatever legal force law of contracts will give to it. Vernon's Ann.Civ.St. art. 4638.

12. Divorce Key 249(2)

Judgment in divorce action which recited that parties had arrived at community property settlement agreement which court had found to be fair and reasonable and that court ordered it approved and filed merely approved property settlement agreement which parties themselves had made by which husband was obligated after divorce to pay wife $15,000 in installments, and judgment did not have effect of ordering, contrary to public policy of Texas, the payment of alimony; *McBride v. McBride*, 256 S.W.2d 250 disapproved. Vernon's Ann.Civ.St. art. 4638.

Gerald B. Shifrin, El Paso, for petitioner.

Doyle H. Gaither, El Paso, for respondent.

CALVERT, Chief Justice.

Respondent and petitioner were formerly husband and wife. Their marriage was dissolved by a judgment of a district court of El Paso County, entered on May 5, 1959, which granted a divorce to petitioner on her cross-action. The judgment also approved a property settlement agreement entered into by the parties.

The property settlement agreement was executed by respondent and petitioner on April 29, 1959. It dealt with several matters. Only one provision is of concern to us in this case. By that provision petitioner agreed to relinquish all right, title and interest in and to the property of respondent in consideration of his agreement to pay her the sum of $15,000,

the obligation to be evidenced by a non-interest bearing promissory note. The $15,000 obligation was payable in monthly installments of $50 each for the first eight months and $100 each thereafter until it was fully paid. The first $7,500 of the obligation was to be paid regardless of petitioner's marital status, but the remaining $7,500 was to be paid only if petitioner remained unmarried. The 1959 judgment found the property settlement agreement to be fair, just and reasonable and ordered it "approved and filed herewith."

This suit for a declaratory judgment was filed by respondent. He had paid $7,500 on the obligation before he filed the suit. He alleged that the provision in the settlement agreement for payment of the remaining $7,500 "is nothing more than an agreement to pay alimony and is contrary to the law of the State of Texas, contravenes public policy of the State of Texas, and is void." He prayed that the court declare "that the conditional $7,500 * * * is unenforceable and void and that the note * * * be declared void." The trial court denied respondent the relief he sought, and by its judgment the court declared the property settlement agreement, the note, and the 1959 judgment approving the agreement to be valid. At the request of respondent, the trial judge filed findings of fact and conclusions of law. Among other things, the trial judge found and concluded that at the time of the divorce respondent received all of the community property of the parties, including $2,500 in cash; that neither the agreement of respondent to pay $15,000, the note for that sum, nor the judgment approving the agreement imposed an obligation to pay alimony; that petitioner had never remarried, and that respondent was estopped to assert invalidity of the instruments. The court of civil appeals reversed the judgment of the trial court. In so doing, however, it did not decide whether the agreement and the note were valid or invalid; it declared only that the portion of the 1959 judgment which approved the provision for

payment of $15,000 required the payment of alimony and was void. Tex.Civ.App., 407 S.W.2d 295.

The declaratory judgment rendered by the court of civil appeals does not fully dispose of the questions in the case. For, assuming for the moment that the portion of the 1959 judgment which approved the provision in the settlement agreement obligating respondent to pay $15,000 was, in effect, an order to pay alimony and therefore void, the question still remains whether the *contractual* obligation is an obligation to pay alimony and equally void. Before a correct answer to this question can be formulated, we must answer a preliminary question: What is "alimony"?

Courts have ascribed to the word "alimony" different legal meanings, the meaning given usually being attuned to the particular fact situation with which the particular court was dealing. See cases cited in 3 *Words and Phrases* p. 178, *et seq.* (Perm.Ed.1953). The meaning which we deem to be correct and which is most comprehensive is found in the following excerpt from 24 Am.Jur.2d 641, Divorce and Separation § 514:

> "In the English law the term 'alimony' was originally used to signify the allowance *judicially granted* to a wife for support during a divorce a mensa et thoro [divorce from bed and board] or during separation, but it has come generally, in legal parlance, to include also the provision or allowance, whether periodical or in gross, *judicially made* to a wife upon an absolute divorce * * *. Consequently, *every provision in a judgment* of divorce or separation made solely for this purpose [food, clothing, habitation and other necessaries for support] is to be regarded as alimony, whether expressly designated as

such or not, and irrespective of whether it requires payment of money at intervals or in a gross sum * * *."[1]

[1] The central idea to be drawn from the excerpt is that to be alimony the allowance to or provision for the wife's support, whether during pendency of the suit, during a divorce from bed and board (divorce a mensa et thoro), or after an absolute divorce (divorce a vinculo matrimonii), must have been made by a judgment or decree of a court. That this is so finds support in a host of decided cases. Examples: "Generally the term 'alimony' is used to designate payments which the husband makes to the wife *under a court order* for her support pending a divorce action or after a divorce has been granted." *Miller v. Miller*, 88 Idaho 57, 396 P.2d 476, 479 (1964). "Alimony is an allowance *in a decree of divorce*, carved out of the estate of the husband for the support of the wife." *Adler v. Adler*, 373 Ill. 361, 26 N.E.2d 504, 508 (1940). "Alimony, as that term is used in the law, is an allowance made for the support of the wife out of the estate of the husband *by order of court* in an appropriate proceeding, and is either temporary or permanent." *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240, 242 (1964). "Alimony is but the *judicial admeasurement* of the husband's obligation to maintain his former wife periodically out of his income." *Madden v. Madden*, 136 N.J.Eq. 132, 40 A.2d 611, 614 (1945). "Alimony is an allowance which, *by order of the court,* the husband is compelled to pay the wife from the date he has been legally separated or divorced, for her support and maintenance." *Henderson v. Henderson*, 37 Or. 141, 60 P. 597, 599, 61 P. 136, 48 L.R.A. 766 (1900). "Comprehensively considered, that term [alimony] is generally used and understood by the courts and elsewhere as meaning an allowance to be paid by the husband to the wife for her support and

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[1] Emphasis ours throughout.

maintenance, and often their dependent children, *pursuant to an order or decree by the court* in a divorce proceeding." *Van Dommelen v. Van Dommelen*, 218 Mich. 149, 187 N.W. 324, 325 (1922).

[2] The foregoing authorities exclude the idea that a mere contractual obligation of a husband to make future periodic or lump sum payments for the support and maintenance of his wife is a provision for alimony. As a matter of fact, courts of other jurisdictions which recognize and authorize alimony after a divorce is absolute, as the law of this State does not, make a distinction between alimony and contractual obligations. *Solomon v. Solomon*, 149 Fla. 174, 5 So.2d 265 (1942); *Mesler v. Jackson Circuit Judge*, 188 Mich. 195, 154 N.W. 63 (1915); *Miller v. Miller*, 88 Idaho 57, 396 P.2d 476 (1964); *Hayes v. Hayes*, 191 Ga. 237, 11 S.E.2d 764 (1940); *Dickey V. Dickey*, 154 Md. 675, 141 A. 387, 58 A.L.R. 634 (1928); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964). The question has usually arisen in contempt proceedings against a husband based on his failure to make alimony payments as directed in a prior divorce decree. In *Solomon* a separation agreement between husband and wife obligated the husband to make monthly support payments. The divorce decree contained a recital that the agreement "is hereby approved and ratified in all respects and incorporated by reference into this Decree and made a part hereof." The Supreme Court of Florida held that the decree so fully incorporated the agreement that the payments constituted alimony and were enforceable by contempt proceedings. The same holding was made by the Supreme Court of Michigan in *Mesler* in which the divorce decree specifically ordered payment of an agreed sum for support of the wife. In *Miller*, on the other hand, the Supreme Court of Idaho upheld the right of a divorced wife to recover monthly sums which the husband had obligated himself in a separation agreement to

pay "as alimony" against a contention that the obligation was neither alimony nor valid since it had not been included in the divorce decree. In *Bunn* the Supreme Court of North Carolina had occasion to distinguish between consent judgments for the payment of subsistence to the wife in which the divorce decree merely approves the agreement and those in which the divorce decree adopts the agreement as the court's judgment and orders the payments made. The court said judgments of the first type were enforceable only as ordinary contracts whereas the latter type were enforceable by contempt proceedings.

[3-6] The statutes and public policy of this State do not sanction alimony for the wife after a judgment of divorce has been entered. See *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722, 747 (1961); *Cunningham v. Cunningham*, 120 Tex. 491, 40 S.W.2d 46, 75 A.L.R. 1305 (1931); Art. 2328b-1, Sec. 2(6); Art. 2328b-3, Sec.7.[2] In this State as in other states, alimony is an allowance for support and sustenance of the wife, periodic or in gross, *which a court orders a husband to pay*; but in this State, unlike in other states, such support payments may be ordered only "until a final decree shall be made in the case." Art. 4637; *Cunningham v. Cunningham, supra.* Support payments ordered to be made after divorce from the income from the husband's property, although considered alimony in many jurisdictions, is not considered alimony in this State. *Hedtke v. Hedtke,* 112 Tex. 404, 248 S.W. 21 (1923); *Keton v. Clark,* 67 S.W.2d 437 (Tex.Civ.App. — Waco 1933, *writ refused*). When its true meaning is distilled from the statutes and the court decisions of this State, alimony which contravenes the public policy of the State is only those payments imposed by a court order or

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[2] All references to articles are to Vernon's Ann.Texas Civil Statutes.

decree on the husband as a personal obligation for support and sustenance of the wife after a final decree of divorce.

[7,8] From what has been said, it follows that obligations assumed by the husband in separation agreements or contracts to make payments for the support of the wife after a divorce decree becomes final, are not obligations to pay alimony and do not violate the public policy of this State. The contractual obligation of respondent to pay to petitioner the remaining $7,500 of his $15,000 obligation and his promissory note evidencing his obligation are, therefore, not void as being in violation of the public policy of this State. Obligations of this type may be void or unenforceable for other reasons but none are urged here for so declaring.

—There remains the question of the validity of the provision of the judgment of May 5, 1959, which approved the agreement of the parties. The provision reads:

> "It further appearing to the Court that the parties hereto have arrived at a community property settlement agreement which the Court has examined and finds to be fair and reasonable and just, the Court hereby ORDERS it APPROVED and filed herewith."

[9-12] On the face of it, the provision did not purport to order respondent to pay the sum of $15,000 to petitioner in installments after the judgment became final; it merely approved a property settlement agreement which the parties themselves had made. While Art. 4638 directs courts granting divorces to "order a division of the estate of the parties in such a way as the court shall deem just and right," it is not the purpose of the statute to proscribe amicable division and settlement by the parties. And if as a part of their settlement the parties agree that the husband will make support payments to the wife after a divorce is granted, approval of the agreement by the court should not be held to invalidate it as

alimony. Amicable settlement by the parties of their property rights should be encouraged, not discouraged. The agreement will then have whatever legal force the law of contracts will give to it. *See Ex Parte Jones,* 163 Tex. 513, 358 S.W.2d 370 (1962).

A number of decisions of courts of civil appeals beginning with *McBride v. McBride,* 256 S.W.2d 250 (Tex.Civ.App. — Austin 1953, *no writ*) have held that contracts made in contemplation of divorce which impose a personal obligation on a husband to make payments for support of his wife after divorce are void as against the public policy of this State. They need not be cited. In so far as they conflict with what we have said here, they are disapproved. In *McBride* the trial court *ordered* the divorced husband to pay certain monthly sums for the support of the wife after divorce. Only the validity of that part of the judgment, not the validity of the agreement between the parties, was in issue. The opinion indicates that the court thought the agreement of the husband to pay was also alimony and void. From what we have said in this opinion, it is obvious that we do not agree with that conclusion.

The judgment of the court of civil appeals is reversed and the judgment of the trial court is affirmed.

Robert Lee JENSEN, Petitioner.

v.

Burlene Parks JENSEN, Respondent.

No. C-1220.

Supreme Court of Texas.

Feb. 29, 1984.

Former wife appealed from divorce decree of the District Court, Dallas County, Whittington, J., providing that corporate stock acquired by former husband prior to marriage, together with increases in value thereof during the parties' marriage, were separate property of former husband. The Tyler Court of Appeals, Twelfth Supreme Judicial District, 629 S.W.2d 222, McKay, J., reversed and remanded. Former husband petitioned for review. The Supreme Court, Wallace, J., upon withdrawing original opinion and judgment on motion for rehearing, held that: (1) the Supreme Court would adopt "reimbursement," rather than "community ownership," theory regarding increase in value during marriage of property owned by a spouse prior to marriage, with effect that community is to be reimbursed for value of time and effort expended by either or both spouses to enhance separate estate of either, other than that reasonably necessary to manage and preserve separate estate, less remuneration received for that time and effort in form of salary, bonus, dividends, and other fringe benefits, and (2) corporate stock owned separately by former husband prior to the parties' marriage remained his separate property to extent of value thereof as appreciated during the marriage, subject only to right of reimbursement, if any, for value of former husband's time and effort expended in producing the increases in value, should it be determined on retrial that former husband and, thus, the community had not been adequately compensated therefor during the marriage.

Remanded.

Robertson, J., concurred and filed opinion.

1. Husband and Wife Key 258

Supreme Court would adopt "reimbursement," rather than "community ownership," theory regarding increase in value during marriage of property owned by a spouse prior to marriage, with effect that community is to be reimbursed for value of time and effort expended by either or both spouses to enhance separate estate of either, other than that reasonably necessary to manage and preserve separate estate, less remuneration received for that time and effort in form of salary, bonus, dividends, and other fringe benefits, those items being community property when received.

2. Husband and Wife Key 258

Corporate stock owned separately by former husband prior to parties' marriage remained his separate property to extent of value thereof as appreciated during the marriage, subject only to right of reimbursement, if any, for value of former husband's time and effort expended in producing the increases in value, should it be determined that former husband and, thus, the community had not been adequately compensated therefor during the marriage. Vernon's Ann.Texas Const. Art. 16, § 15.

3. Divorce Key 253(2)

Burden of proving charge upon corporate stock separately owned by former husband, based upon claim for reimbursement to the community for value of former husband's time and effort expended in producing increases in value of the stock during the parties' marriage, was upon former wife as claimant.

4. Divorce Key 252.3(5)

Assuming that former wife were to establish on retrial right of the community to be reimbursed for value of former husband's time and effort expended in producing increases in his separately owned corporate stock during the parties' marriage, lien was not to attach to former husband's separate property shares but, rather, money judgment could be awarded.

Jackson, Walker, Winstead, Cantwell & Miller, D.L. Case and Jack Pew, Jr., Dallas, for petitioner.

Albach, Gutow & Blume, James D. Blume, Dallas, for respondent.

ON MOTION FOR REHEARING

WALLACE, Justice.

This court's opinion and judgment of November 9, 1983, are withdrawn and the following opinion is substituted therefor.

Petitioner, Robert Lee Jensen, and Respondent, Burlene Parks Jensen, were divorced on May 21, 1980. The decree of divorce provided that 48,455 shares of stock in RLJ Printing Co., Inc, acquired by Mr. Jensen four months prior to marriage, together with any increase in value in such stock which occurred during marriage, were the separate property of Mr. Jensen, and denied Mrs. Jensen any interest in the stock or its increased value. The court of appeals reversed and remanded, holding that the community should be compensated for an enhancement in value of the stock because such appreciated value had been due primarily to the time, toil and effort of Mr. Jensen. 629 S.W.2d 222. We remand to the trial court for determination of the amount, if any, of reimbursement to the community.

On March 21, 1975, Mr. Jensen formed the RLJ Printing Company, Inc. (RLJ) and for $1.56 per share acquired 48,455 of the 100,000 shares outstanding. On May 16, 1975, RLJ acquired Newspaper Enterprises, Inc., in what the trial court found to be a "unique business opportunity." The Jensens were married on July 21, 1975, separated on June 3, 1979, and divorced on May 21, 1980. At all pertinent times, Mr. Jensen was the key man in the operation of RLJ, which was a holding company whose sole assets consisted of all of the stock of Newspaper Enterprises, Inc. Mr. Jensen's compensation from RLJ, consisting of salary, bonuses and dividends, was $64,065.97 in 1976, $95,426.00 in 1977, $106,143.00 in 1978 and $115,000.00 in 1979.

The record does not reflect that any evaluation of the RLJ stock was made as of the date of the marriage. At trial, the per share value of the stock was $13.48 according to Mr. Jensen's expert and $25.77 according to Mrs. Jensen's expert.

The findings of fact and conclusions of law made by the trial court are as follows:

FINDINGS OF FACT

1. The RLJ Printing Company, Inc. was created by Respondent before the marriage of the parties.
2. RLJ Printing Company, Inc. acquired the stock of Newspaper Enterprises, Inc., 64 days before the marriage of the parties in a unique business opportunity.
3. RLJ Printing Company, Inc. is not an alter ego of the respondent.
4. RLJ Printing Company, Inc. was not created in fraud of the rights of the community estate.
5. The salary paid Respondent has been adequate and reasonable.

6. The dividends paid Respondent have been adequate and reasonable.

7. The bonuses paid Respondent have been adequate and reasonable.

8. Respondent was the key man in the operation of RLJ Printing Company, Inc.

9. The successful operations of RLJ Printing Company, Inc. were primarily due to the time, toil and effort of Respondent.

CONCLUSIONS OF LAW

1. The community was not the equitable owner of any shares of RLJ Printing Company, Inc.

2. The community was not entitled to receive the value of the appreciation in shares of RLJ Printing Company, Inc. that was due to the successful operations of the company.

3. The community was not entitled to receive the value of the appreciation in shares of RLJ Printing Company, Inc. that was due to the time, toil and effort of Respondent.

[1] The point of first impression squarely before us is how to treat, upon divorce, corporate stock owned by a spouse before marriage but which has increased in value during marriage due, at least in part, to the time and effort of either or both spouses.

The community property states have adopted variations of either "reimbursement" or "community ownership" theories. Common to both theories is the general concept that the community should receive whatever remuneration is paid to a spouse for his or her time and effort because the time and effort of each spouse belongs to the community. Though sharing a common conceptual basis, the two theories diverge

when it comes to the valuation of the community's claim against separately owned stock that has appreciated by virtue of a spouse's time and effort. The "reimbursement" theory provides that the stock, as it appreciates, remains the separate property of the owner spouse. Under this theory, the community is entitled to reimbursement for the reasonable value of the time and effort of both or either of the spouses which contributed to the increase in value of the stock. The "community ownership" theory, on the other hand, holds that any increase in the value of the stock as a result of the time and effort of the owner spouse becomes community property.

A consideration of the writings of various scholars in this field, the treatment of the issue by our sister community property states, and the constitutional, statutory and case law of Texas leads to the conclusion that the reimbursement theory more nearly affords justice to both the community and separate estates. This theory requires adoption of the rule that the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received.

[2] This rule is a reasonable means of assuring that the community will be fully reimbursed for the value of community assets, i.e., time and effort expended, while at the same time providing that the property interest of the separate estate is also protected and preserved. As a practical matter, this rule will obviate the need for the trial court to undertake the onerous and quite often impossible burden that would be placed on it under the community ownership theory of attempting to determine just what factors actually contributed to the increase in value of the stock and in what proportion. The

reimbursement theory of compensation is also consistent with the laws of Texas as found in the Texas Constitution, statutes and Supreme Court opinions set out below.

The Texas Constitution, Art. XVI, § 15, provides that property owned by a spouse before marriage remains the separate property of that spouse during marriage. In *Welder v. Lambert,* 91 Tex. 510, 44 S.W. 281 (1898), this Court decided that all property held by either a husband or a wife before marriage remains the separate property of such spouse and the status of the property is to be determined by the origin of the title to the property, and not by the acquisition of the final title. *Ibid.* This Court has consistently adhered to the rule expressed in *Welder. Dakan v. Dakan,* 125 Tex. 305, 83 S.W.2d 620, 624 (1935); *Creamer v. Briscoe,* 101 Tex. 490, 109 S.W. 911 (1908); *Peterson v. Peterson,* 595 S.W.2d 889 (Tex.Civ.App. — Austin 1980, *writ ref'd n.r.e.*); *Henry v. Reinle,* 245 S.W.2d 743, 744 (Tex.Civ.App. — Waco 1952, *writ ref'd n.r.e.*). The shares of RLJ stock thus remain the separate property of Mr. Jensen, subject only to the right of reimbursement, if any, proven by Mrs. Jensen.

The trial court found that Mr. Jensen was adequately and reasonably compensated for his time and effort expended in enhancing the value of the RLJ shares. This finding, if sustained, precludes Mrs. Jensen's right to reimbursement because that compensation was community property.

The only evidence offered at trial to establish the reasonableness of Mr. Jensen's compensation was the testimony of Mr. T. Wesley Hickman. Mr. Hickman was an expert in the field of corporate evaluation. It was his opinion that Mr. Jensen was reasonably compensated, but he based that opinion "primarily upon Mr. Jensen's percentage of the stock ownership." He further stated that without the stock ownership he seriously doubted that Mr. Jensen would have stayed

with RLJ. His opinion as to reasonable compensation was primarily based upon Mr. Jensen's stock ownership and not upon the salary, bonuses and dividends received by the community due to the time, toil and effort of Mr. Jensen. Therefore the trial court's finding that Mr. Jensen's compensation was reasonable is without adequate support. Without that finding of fact there is no basis for the trial court's finding that "the community was not entitled to receive the value of the appreciation in shares of RLJ Printing Company, Inc. that was due to the time, toil and effort of respondent."

[3,4] Upon retrial of this case the burden of proving a charge upon the shares of RLJ owned by Mr. Jensen will be upon the claimant, Mrs. Jensen. *Welder, supra; Burton v. Bell,* 380 S.W.2d 561 (Tex.1964). The right to reimbursement is only for the value of the time, toil and effort expended to enhance the separate estate other than that reasonably necessary to manage and preserve the separate estate, for which the community did not receive adequate compensation. *Vallone v. Vallone,* 644 S.W.2d 455, 459 (Tex.1982). However, if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded. *Burton v. Bell, supra.*

It has long been the rule of this court to remand to the trial court rather than to render judgment when the ends of justice will be better served thereby. Such remanding has often been ordered to supply additional testimony or to amend pleadings. *Karl & Kelly Company v. McLerran,* 646 S.W.2d 174 (Tex.1983).

Therefore, pursuant to TEX.R.CIV.P. 505, we remand this cause to the trial court for the limited purpose of determining the amount of reimbursement, if any, due to the community as a result of the time, toil and talent expended by Mr. Jensen toward enhancement of the stock of RLJ. From the value of the time, toil and talent expended is to be subtracted

the compensation paid to Mr. Jensen for such time, toil and talent in the form of salary, bonuses, dividends and other fringe benefits. Any remainder is the reimbursement due the community. This reimbursement, if any, shall be distributed by the trial court in addition to the property division heretofore made to the parties.

Concurring opinion by ROBERTSON, J.

ROBERTSON, Justice, concurring.

I concur in the result reached by the majority. This Court in *Vallone v. Vallone,* 644 S.W.2d 455 (Tex.1968), did not remand that cause to the trial court on the basis of Mrs. Vallone's failure to plead the affirmative relief or reimbursement. 644 S.W.2d at 458. Although Mrs. Jensen, like Mrs. Vallone, did not plead reimbursement this Court has remanded the cause of action in the interest of justice. The majority opinion offers no explanation for the different disposition.

Until *Vallone,* Texas courts had traditionally followed a general rule of construing divorce pleadings liberally. *Cohen v. Cohen,* 194 S.W.2d 273, 275 (Tex.Civ.App. — Austin 1946, *no writ*). The majority opinion in *Vallone* appeared to mark the beginning of a shift to a policy requiring specific pleadings in family law matters. 644 S.W.2d at 466. However, the rise of the requirement of specific pleadings was short lived. The majority opinion, handed down thirteen months later, announces a return to a broad construction of divorce pleadings. Although a member of the majority in *Vallone,* I am of the opinion that this Court's return to a more liberal policy for construing divorce pleadings will provide trial judges with the freedom needed to reach just decisions in complex and sensitive family law actions.

No. 92-14835-T
ENDORSEMENT ON INSTRUMENT

William Austin
vs.
Cynthia Austin

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Signed and Entered: October 15, 1993
Recorded in Vol. T. 166, page 421

IN THE MINUTES OF THE 301ST JUDICIAL
DISTRICT COURT OF DALLAS COUNTY, TEXAS

920 S.W. 2d 776

Cynthia Lee DAWSON-AUSTIN, Appellant
V.
William Franklin AUSTIN, Appellee.

No. 05-94-00056-CV.

Court of Appeals of Texas,
Dallas.

Feb. 29, 1996.

In divorce proceeding, the 301st District Court, Dallas County, Robert O'Donnell, J., issued decree of divorce. Wife appealed. The Court of Appeals, Lagarde, J., held that: (1) wife's alleged acceptance of temporary support, interim attorney fees, expenses of transporting witnesses to trial, and attorney fees included in divorce decree did not render wife estopped from appealing trial court's judgment; (2) by arguing her motion to quash service of citation at hearing after trial court had denied wife's defective unsworn special appearance, wife forfeited her right to amend special appearance, and generally appeared; (3) wife's answer was unconditional and, thus, wife waived service of process and any defects in service of process; (4) trial court did not abuse its discretion in refusing to stay or abate proceeding pending conclusion of divorce proceeding instituted earlier by wife in California, in light of wife's delay in serving process on husband in California proceeding; (5) trial court was not required to apply California law in proceeding pursuant to statute governing division of undivided assets when prior court had jurisdiction to divide property but failed to do so; (6) Texas, rather than Minnesota, was state with most significant relationship to action and, thus, Texas characterization principles for division of property were applicable, and accrued value of husband's stock in closely held Minnesota corporation was husband's separate property and was not

property apart from stock itself; (7) wife failed to show good cause for her failure to supplement discovery responses as to her expert witnesses so as to permit experts to testify; and (8) evidence supported trial court's finding that its division of community property, awarding 55.59% to wife and 44.40% to husband, was just and right, and such division was not manifestly unjust.

Affirmed.

[1] DIVORCE Key 184(2)
134kl84(2)

Wife's alleged acceptance of temporary support, interim attorney fees, expenses of transporting witnesses to trial, and attorney fees included in divorce decree did not render wife estopped from appealing trial court's judgment in divorce proceeding; interim attorney fees, witness transportation expenses, and temporary spousal support were not part of final divorce decree, wife would have sufficient assets to cover possible reimbursement of attorney fees, if necessary, and record did not show any possibility that reversal of judgment would prejudice husband's rights to benefits secured under judgment.

[2] APPEAL AND ERROR Key 161
30kl6l

Litigant cannot treat judgment as both right and wrong by voluntarily accepting benefits of judgment while prosecuting appeal from it.

[3] APPEAL AND ERROR Key 161
30k161

Rule, that litigant cannot treat judgment as both right and wrong by voluntarily accepting benefits of judgment while prosecuting appeal from it, is inapplicable when reversal of

judgment on grounds asserted by appellant could not possibly affect those benefits received.

[4] DIVORCE Key 175
134k175

By not making any argument or citing any authorities in brief in support of her asserted point of error on appeal, contending that trial court erred in denying her motion for continuance, wife waived point of error in divorce proceeding. Rules App.Proc., Rule 74(f).

[5] APPEAL AND ERROR Key 1079
30k1079

Points of error asserted on appeal but not briefed are waived. Rules App.Proc., Rule 74(f).

[6] DIVORCE Key 105
134k105

Trial court properly denied wife's unverified special appearance in divorce proceeding; wife's verification attached to instrument failed to swear to her personal knowledge and to truth of special appearance. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subd. 1.

[7] APPEARANCE Key 9(1)
31k9(1)

Trial court does not err in denying unsworn special appearance. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subd. 1.

[8] DIVORCE Key 81
134k81

By arguing her motion to quash service of citation at hearing after trial court had denied wife's defective unsworn special appearance, wife forfeited her right to amend special appearance, and generally appeared, in divorce proceeding. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subds. 1, 2.

[9] CONSTITUTIONAL LAW Key 305(5)
92k305(5)

Trial court's exercise of jurisdiction over nonresident wife did not violate her constitutional due process rights in divorce proceeding, where wife generally appeared before presenting her amended special appearance. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subds. 1, 2.

[9] DIVORCE Key 65
134k65

Trial court's exercise of jurisdiction over nonresident wife did not violate her constitutional due process rights in divorce proceeding, where wife generally appeared before presenting her amended special appearance. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subds. 1, 2.

[10] CONSTITUTIONAL LAW Key 305(5)
92k305(5)

When party generally appears in case before obtaining favorable ruling on special appearance, trial court can exercise jurisdiction over party without violating party's due process rights. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subds. 1, 2.

[10] COURTS Key 37(3)
106k37(3)

When party generally appears in case before obtaining favorable ruling on special appearance, trial court can exercise jurisdiction over party without violating party's due process rights. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Rules Civ.Proc., Rule 120a, subds. 1, 2.

[11] DIVORCE Key 76
134k76

Wife's answer was unconditional and, thus, wife waived service of process and any defects in service of process in divorce proceeding, despite fact that answer stated it was filed "subject to" motion to quash citation, where answer did not state that it was to be considered only in event that motion to quash was overruled. Vernon's Ann.Texas Rules Civ.Proc., Rule 122.

[12] PLEADING Key 34(1)
302k34(1)

For answer to be conditional, answer must expressly state conditions under which it can be considered.

[13] DIVORCE Key 81
134k81

Provisions of rule permitting pleas and motions to be filed in same instrument as special appearance or filed after special appearance without waiving it would not be applied to wife's motion to quash service of citation in divorce proceeding. Vernon's Ann.Texas Rules Civ.Proc., Rules 120a, subd. 1, 122.

[14] ACTION Key 69(2)
13k69(2)

Trial court did not abuse its discretion in refusing to stay or abate husband's Texas divorce proceeding pending conclusion of divorce proceeding instituted earlier by wife in California, in light of wife's delay in serving process on husband in California proceeding until after husband had served process on wife in Texas proceeding; wife delayed six months before having husband served, husband's alleged statement to wife that he did not think they should get divorced did not contain sort of representation that could have excused wife from serving husband with process, and most of wife's stated reasons did not constitute "diligence" in obtaining service of process but, at best, merely constituted attempts at explanations for her lack of diligence.

[14] DIVORCE Key 82
134k82

Trial court did not abuse its discretion in refusing to stay or abate husband's Texas divorce proceeding pending conclusion of divorce proceeding instituted earlier by wife in California, in light of wife's delay in serving process on husband in California proceeding until after husband had served process on wife in Texas proceeding; wife delayed six months before having husband served, husband's alleged statement to wife that he did not think they should get divorced did not contain sort of representation that could have excused wife from serving husband with process, and most of wife's stated reasons did not constitute "diligence" in obtaining service of process but, at best, merely constituted attempts at explanations for her lack of diligence.

[15] ACTION Key 68
13k68

Motion to stay is directed to discretion of court, and granting or denying of motion will only be reviewed for abuse of discretion.

[15] APPEAL AND ERROR Key 949
30k949

Motion to stay is directed to discretion of court, and granting or denying of motion will only be reviewed for abuse of discretion.

[16] ABATEMENT AND REVIVAL Key 13
2k13

Mere pendency of action in one state will not be grounds for abating suit in another state between same parties and involving same subject matter; however, as matter of comity, it is customary for court in which later action is instituted to stay proceedings until prior action is determined, and the custom has practically grown into general rule that strongly urges court in which subsequent action is instituted to stay or abate its proceedings.

[16] ACTION Key 69(2)
13k69(2)

Mere pendency of action in one state will not be grounds for abating suit in another state between same parties and involving same subject matter; however, as matter of comity, it is customary for court in which later action is instituted to stay proceedings until prior action is determined, and the custom has practically grown into general rule that strongly urges court in which subsequent action is instituted to stay or abate its proceedings.

[17] ACTION: Key 69(2)
13k69(2)

For purposes of rule of comity under which it is customary for court in which later action is instituted to stay proceedings until prior action in another state is determined, when plaintiff unreasonably delays in serving process on defendant in prior action, trial court does not necessarily abuse its discretion in refusing to stay later-filed case.

[18] DIVORCE Key 2
134k2

Trial court was not required to apply California law in Texas divorce proceeding pursuant to statute governing division of undivided assets when prior court had jurisdiction to divide property but failed to do so; when wife filed for bankruptcy protection before California court entered its divorce decree, she deprived California court of jurisdiction to divide any property in which she had interest and, thus, statute was inapplicable. V.T.C.A., Family Code §§ 3.91(b), 3.92(b); Rules of Civ.Evid., Rule 202.

[19] EVIDENCE Key 80(1)
157k80(1)

For purposes of judicial notice of court decisions of other states, in absence of pleading and proof of law of sister state, it is presumed that law of state where judgment was rendered is identical to law of Texas. Rules of Civ.Evid., Rule 202.

[20] DIVORCE Key 404.1
134k404.1

Wife waived any res judicata effect of California divorce decree by failing to affirmatively plead res judicata in Texas divorce proceeding and, thus, Texas trial court did not err in entering divorce decree.

[21] JUDGMENT Key 948(1)
228k948(l)

Failure to plead res judicata results in waiver of its effect.

[22] JUDGMENT Key 178
228k178

Function of summary judgment is not to deprive litigant of its right to full hearing on the merits of any real issue of fact, but is to eliminate patently unmeritorious claims and untenable defenses.

[23] JUDGMENT Key 185(2)
228k185(2)

Standards for reviewing summary judgment motion are: movant has burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; in deciding whether there is disputed material fact issue precluding summary judgment, evidence favorable to nonmovant will be taken as true; and every reasonable inference must be indulged in favor of nonmovant and any doubts resolved in its favor.

[24] JUDGMENT Key 178
228k178

Purpose of summary judgment rule is not to provide either trial by deposition or trial by affidavit, but to provide method of summarily terminating case when it clearly appears that only question of law is involved and that no genuine issue of material fact remains.

[25] DIVORCE Key 252.3(3)
134k252.3(3)

For purposes of distribution of property in divorce proceeding, spouse's separate property is considered in terms of item itself, not in terms of its value.

[26] HUSBAND AND WIFE Key 257
205k257

For purposes of distribution of property in divorce proceeding, if spouse's separate property produces income, that income is community property; however, increase or decrease in value of item of separate property is inherent part of item and cannot be separated from it.

[27] HUSBAND AND WIFE Key 258
205k258

For purposes of distribution of property in divorce proceeding, community estate is entitled to reimbursement from spouse's separate estate for improvements to separate estate paid for by community estate; if spouse's separate estate is improved by time, toil, and effort of one or both spouses, community has equitable claim for reimbursement for reasonable value of time, toil, and effort spent increasing value of spouse's separate estate.

[28] HUSBAND AND WIFE Key 258
205k258

For purposes of distribution of property in divorce proceeding, community is not entitled to reimbursement for increases in value of spouse's separate property caused by market forces.

[29] DIVORCE Key 252.3(3)
134k252.3(3)

Under Minnesota law, for purposes of distribution of property in divorce proceeding, any increase in value of nonmarital property attributable to time, toil, and effort of one of spouses during marriage is "marital property" and is subject to equitable division on divorce.

See publication *Words and Phrases* for other judicial constructions and definitions.

[30] DIVORCE Key 2
134k2

Statute governing division of property in divorce proceeding does not operate as comprehensive choice-of-law provision in property characterization issues such that, if property is characterized as community property in residential state of acquiring party but would have been separate property if parties had resided in Texas, then in divorce proceeding in Texas court the property will be classified as separate property. V.T.C.A., Family Code § 3.63(b)(1).

[30] HUSBAND AND WIFE Key 246
205k246

Statute governing division of property in divorce proceeding does not operate as comprehensive choice-of-law provision in property characterization issues such that, if property is characterized as community property in residential state of acquiring party but would have been separate property if parties had resided in Texas, then in divorce proceeding in Texas court the property will be classified as separate property. V.T.C.A., Family Code § 3.63(b)(1).

[31] DIVORCE Key 2
134k2

Texas, the state in which husband currently resided and in which husband filed for divorce, rather than Minnesota, the state in which parties were married, was state with most significant relationship to divorce action and, thus, Texas characterization principles for division of property were applicable, and accrued value of husband's stock in closely-held Minnesota corporation was husband's separate property and was not property apart from stock itself, where husband owned shares before marriage and owned them without interruption throughout marriage. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

[32] ACTION Key 17
13k17

For choice-of-law purposes, factor of protection of justified expectations concerns whether parties have molded their conduct to conform to requirements of particular state; if parties act without thought of legal consequences, they have no justified expectations to protect and factor cannot play part in decision of choice-of-law question. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2), comment.

[33] HUSBAND AND WIFE Key 258
205k258

For purposes of division of property in divorce proceeding, reimbursement by spouse, whose separate estate has been improved by assets of community estate, to community estate for those assets and time, toil, and effort, can take form of salary to spouses from separate-property business or community's receipt of other benefits from separate estate.

[34] PRETRIAL PROCEDURE Key 42
307Ak42

Formalities necessary to respond originally to request for discovery should apply to supplemental response. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 6, par. a.

[35] PRETRIAL PROCEDURE Key 304
307Ak304

Supplemental answers to interrogatories must be sworn. Vernon's Ann.Texas Rules Civ.Proc., Rules 166b, subd. 6, par. a, 168, subd. 5.

[36] DIVORCE Key 85
134k85

Wife failed to show good cause for her failure to supplement discovery responses as to her expert witnesses so as to permit experts to testify in divorce proceeding; wife's failure to sign documents prevented proper supplementation of wife's answers to interrogatories, and that situation was not result of any incapacitation of wife, but was caused by her unexplained refusal to communicate with her attorney. Vernon's Ann.Texas Rules Civ.Proc., Rules 166b, subd. 6, par. a, 168, subd. 5, 215, subd. 5.

[37] PRETRIAL PROCEDURE Key 19
307Akl9

Determination of whether party has shown good cause for failure to comply with discovery for purposes of good-cause exception rests in sound discretion of trial court.

[38] APPEAL AND ERROR Key 945
30k945

Reviewing court will not reverse trial court on matter in its discretion unless record shows that trial court acted without reference to any guiding rules or principles.

[39] PRETRIAL PROCEDURE Key 45
307Ak45

For purposes of rule requiring trial court to exclude any evidence that party failed to disclose in response to proper discovery request, sanction of exclusion is mandatory. Vernon's Ann.Texas Rules Civ.Proc., Rule 215, subd. 5.

[40] DIVORCE Key 253.2
134k253(2)

Evidence supported trial court's finding that its division of community property, awarding 55.59% to wife and 44.40% to husband, was just and right, and such division was not manifestly unjust in divorce proceeding; community estate was valued at $3,750,000, trial court found that both parties were in good health and capable of continuing employment, and court intended unequal division to help wife meet her needs for future support. V.T.C.A., Family Code § 3.63(a).

[41] DIVORCE Key 252.3(2)
134k252.3(2)

Trial court has wide latitude and discretion in dividing community estate of parties upon dissolution of marriage, and on appeal, Court of Appeals presumes that trial court exercised its discretion properly. V.T.C.A., Family Code § 3.63(a).

[41] DIVORCE Key 286(2)
134k286(2)

Trial court has wide latitude and discretion in dividing community estate of parties upon dissolution of marriage, and on appeal, Court of Appeals presumes that trial court exercised its discretion properly. V.T.C.A., Family Code § 3.63(a).

[42] DIVORCE Key 286(5)
134k286(5)

Trial court's exercise of discretion in dividing marital estate upon dissolution of marriage will be disturbed on appeal only when, after reviewing entire record, it appears that division was so unfair and unjust as to constitute abuse of discretion. V.T.C.A., Family Code § 3.63(a).

[43] DIVORCE Key 252.3(2)
134k252.3(2)

In making just and right division of community estate upon dissolution of marriage, trial court must view case in its entirety. V.T.C.A., Family Code § 3.63(a).

[44] DIVORCE Key 252.3(2)
134k252.3(2)

In making just and right division of community estate upon dissolution of marriage, trial court may be guided by factors such as spouses' capacities and abilities, benefits which party not at fault would have derived from continuation of marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and nature of property. V.T.C.A., Family Code § 3.63(a).

[45] DIVORCE Key 252.3(2)
134k252.3(2)

In making just and right division of community estate upon dissolution of marriage, trial court's ultimate division need not be equal as long as it is equitable and circumstances justify disproportionate division. V.T.C.A., Family Code § 3.63(a).

[46] DIVORCE Key 252.3(2)
134k252.3(2)

For purposes of just and right division of community estate upon dissolution of marriage, each case must be examined on its own merits to determine whether unequal distribution was justified. V.T.C.A., Family Code § 3.63(a).

***780** Jeffrey H. Kobs, Thomas M. Michel, and David L. Evans, Hooper Evans & Kobs, L.L.P., Fort Worth, for appellant.

M.J. (Ike) Vanden Eykel, Koons Fuller & Vanden Eykel, Dallas, Harry L. Tindall, Tindall & Foster, Houston, Ann Crawford McClure, McClure & McClure, El Paso, and Richard R. Orsinger, San Antonio, for appellee.

Before LAGARDE, OVARD, and CHAPMAN, JJ.

OPINION ON REHEARING

LAGARDE, Justice.

This Court's opinion of January 3, 1995 is vacated. The following is now the opinion of this Court.

Cynthia Lee Dawson-Austin (Wife) appeals from the decree of divorce entered by the trial court dissolving her marriage to William Franklin Austin (Husband). She brings twenty-one points of error contending that the trial court

lacked jurisdiction over the case, mischaracterized certain stock as Husband's separate property, failed to apply the correct law, erred in proceeding to judgment in the case, and failed to fairly and justly divide the community property. We overrule the points of error and affirm the trial court's judgment.

*781 FACTUAL BACKGROUND

The parties were married in 1980 in China while domiciled in Minnesota. Before they were married, Husband acquired stock in the Starkey Corporation. In February 1992, the couple separated. Husband moved to Texas. Wife filed for divorce in California, but she did not obtain service of process for more than six months. When Husband had resided in Texas six months, he filed for divorce. Husband obtained service of process on Wife in this action before she served him in the California case.

The trial court determined that it had jurisdiction over the parties and the property in the case. It found that the Starkey stock was Husband's separate property and that no part of it constituted community property. The court distributed approximately fifty-five percent of the community estate to Wife and approximately forty-five percent to Husband.

ESTOPPEL

[1] Husband contends in his first reply point that Wife is estopped from appealing the trial court's judgment because she has accepted the benefits of the judgment. Specifically, Husband asserts that Wife's acceptance of temporary support, interim attorney's fees, expenses of transporting witnesses to trial in Dallas, and attorney's fees included in the divorce decree constituted acceptance of the benefits of the judgment.

[2][3] A litigant cannot treat a judgment as both right and wrong by voluntarily accepting the benefits of a judgment while prosecuting an appeal from it. *Carle v. Carle,* 149 Tex. 469, 474, 234 S.W.2d 1002, 1004 (1950); *Demler v. Demler,* 836 S.W.2d 696, 697 (Tex.App. — Dallas 1992, *no writ*). This rule, however, is inapplicable where a reversal of the judgment on the grounds asserted by the appellant could not possibly affect those benefits received. *Carle,* 234 S.W.2d at 1004; *Demler,* 836 S.W.2d at 697. Acceptance of cash benefits has been held to be an exception to the general rule announced in Carle. *Demler,* 836 S.W.2d at 698; *Haggard v. Haggard,* 550 S.W.2d 374, 377 (Tex.Civ.App. — Dallas 1977, *no writ*). Acceptance of cash benefits under a judgment does not necessarily prejudice the rights of the other spouse. Upon redivision of the property, if necessary, the trial court can take into consideration the money awarded. If there is an insufficient cash award to repay the money accepted, assets can be ordered sold to meet the debt. *Demler,* 836 S.W.2d at 698.

The interim attorney's fees, witness-transportation expenses,[1] and temporary spousal support were not part of the final divorce decree, so Wife's acceptance of these benefits does not prejudice her ability to appeal the divorce decree. Wife's acceptance of attorney's fees included in the divorce decree was acceptance of a cash benefit. *See Demler,* 836 S.W.2d at 698. The divorce decree shows that Wife will have sufficient assets to cover a possible reimbursement of the attorney's fees, if necessary. The record does not show any possibility that reversal of the judgment in this case would prejudice Husband's rights to the benefits secured under the judgment. *Demler,* 836 S.W.2d at 698; *Haggard,* 550 S.W.2d

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[1] The record shows that Wife did not take advantage of this benefit.

at 377. We hold that Wife is not estopped from prosecuting her appeal. We overrule Husband's first reply point.

SPECIAL APPEARANCE

After being served in this case, Wife filed on October 30, 1992, in one instrument, a special appearance, a motion to quash service of citation, a plea to the jurisdiction of the court, a plea in abatement, and subject to these, a general denial. On November 10, 1992, the day of the hearing, Wife's attorney filed a motion for continuance. The trial court denied the continuance. The court then denied the facially defective special appearance and proceeded to consider and deny the motion to quash service of citation. The court did not rule on the plea to the jurisdiction or the plea in abatement. On November 11, 1992, Wife filed an amended special appearance and a motion for reconsideration of the special appearance, motion to quash service of citation, plea to the jurisdiction, and plea in abatement. After an evidentiary *782 hearing on November 16, 1992, the trial court denied the motion to reconsider.

Continuance

[4][5] In her first point of error, Wife contends that the trial court erred in denying her motion for continuance. The only mention of the motion for continuance in Wife's brief is the factual statement that Wife filed the motion and the trial court denied it and the legal conclusion that the trial court abused its discretion in refusing to continue the hearing. The brief contains no argument or authorities on this point of error. Rule 74(f) of the Texas Rules of Appellate Procedure requires that an appellant's brief include "such discussion of the facts and authorities relied upon as may be requisite to maintain the point at issue." Tex.R.App.P. 74(f). Points of

error asserted on appeal but not briefed are waived. *See Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 810 (Tex. App.— Houston [1st Dist.] 1987, *writ ref'd n.r.e.*), *cert. dism'd*, 485 U.S. 994, 108 S.Ct.1305, 99 L.Ed.2d 686 (1988); *Charter Builders v. Durham*, 683 S.W.2d 487, 489 (Tex.App. — Dallas 1984, *writ ref'd n.r.e.*). By not making any argument or citing any authorities in support of this point of error, Wife has waived it. We overrule Wife's first point of error.

Defective Special Appearance

[6] In her second point of error, Wife contends that the trial court erred in overruling her special appearance on November 10, 1992.[2] The special appearance was included in an instrument also containing a motion to quash service of citation, a plea to the jurisdiction of the court, a plea in abatement, and Wife's original answer. Wife's verification attached to the instrument, however, failed to swear to her personal knowledge and to the truth of the special appearance.[3] Thus, the special appearance was unverified.

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[2] There is a conflict in the record as to whether the hearing on the original special appearance was held on November 10 or 11. The statement of facts from the hearing states it occurred on November 11. The docket sheet states it occurred on November 10. After the hearing, the trial court signed an order denying the special appearance and motion to quash service of citation. That order is dated November 10.

[3] The verification states:

The undersigned states under oath: "I am the Respondent in the foregoing SPECIAL APPEARANCE, MOTION TO QUASH SERVICE OF CITATION, PLEA TO THE JURISDICTION OF THE COURT, PLEA IN ABATEMENT, AND SUBJECT TO ALL OF THE ABOVE, RESPONDENT'S ORIGINAL ANSWER. I have personal knowledge of the facts and allegations stated in the foregoing MOTION TO QUASH SERVICE OF CITATION, PLEA TO THE JURISDICTION OF THE COURT, PLEA IN ABATEMENT, AND SUBJECT TO ALL OF THE ABOVE, RESPONDENT'S ORIGINAL ANSWER, and they are true and correct."

[7] Rule 120a of the Texas Rules of Civil Procedure governs special appearances. *See* Tex.R.Civ.P. 120a. That rule provides, "Such special appearance shall be made by sworn motion...." Tex.R.Civ.P. 120a(l) (emphasis added). The trial court does not err in denying an unsworn special appearance. *See Villalpando v. De La Garza,* 793 S.W.2d 274, 276 (Tex. App. — Corpus Christi 1990, *no writ*). The special appearance before the trial court on November 10, 1992 was unsworn and, therefore, defective. Accordingly, the trial court did not err in denying the special appearance on November 10, 1992. We overrule Wife's second point of error.

Amended Special Appearance

[8] In her third point of error, Wife contends that on November 16, 1992, the trial court erred in denying her motion to reconsider the denial of her special appearance. After the trial court denied her first special appearance, Wife filed an amended special appearance, motion to quash service of citation, plea to the jurisdiction, plea in abatement, and, subject to all these, a general denial. This document is nearly identical to the original instrument, and "special appearance" is added to the list of items in the verification.

A defective special appearance may be amended to cure the defects. Tex.R.Civ.P. 120a(1); *see Stegall & Stegall v. Cohn,* 592 ***783** S.W.2d 427, 428 (Tex.Civ.App. — Fort Worth 1979, *no writ*). However, the special appearance must be heard and determined before any other plea or motion may be heard. Tex.R.Civ.P. 120a(2). Any appearance not in compliance with rule 120a constitutes a general appearance. Tex.R.Civ.P. 120a(1).

Wife characterizes the omission of the words "special appearance" as a clerical or typographical error. However, clerical error or not, the omission left the special appearance unverified.

At the hearing on November 10, 1992, after the trial court denied the special appearance, the court proceeded to consider the motion to quash service of citation. Wife made no objection to the trial court's consideration of this motion on November 10. Her attorney argued the motion to the trial court. The trial court signed an order that day stating that Wife appeared through her attorney, that the court considered the special appearance and the motion to quash service of citation, and that it denied them.

Husband argues that Wife's failure to amend the special appearance before the trial court heard and ruled on other motions resulted in Wife making a general appearance. Wife argues that the amendment of the special appearance after the trial court had heard and ruled on the motion to quash service of citation did not affect the validity of the special appearance because the rules provide for amendment of special appearances and because Husband set the motion to quash service of citation for a hearing at the same time as the special appearance.

Wife cites cases holding that a special appearance can be amended after the hearing on the special appearance and even after the judgment. *See Koch Graphics, Inc. v. Avantech, Inc.*, 803 S.W.2d 432, 433 (Tex.App. — Dallas 1991, *no writ*); *Stegall & Stegall*, 592 S.W.2d at 429; *Dennett v. First Continental Inv. Corp.*, 559 S.W.2d 384, 385-86 (Tex. Civ.App. — Dallas 1977, *no writ*). However, in none of these cases did the party specially appearing seek any other relief between the initial denial of its special appearance and the hearing on the amended special appearance. Wife, by arguing the motion to quash service of citation at the November 10 hearing, violated the rule that the trial court not rule on any other plea or pleading before the special appearance. Thus, Wife forfeited her right to a "second bite at the apple" on the special appearance.

Wife's argument that Husband set the motion to quash service of citation for hearing at the same time as the special appearance is without merit. Wife did not object when the trial court began considering the motion. Wife argued the motion. She never suggested to the trial court that she wanted to amend her special appearance before the trial court considered any other issues.[4] Wife generally appeared by arguing the motion to quash service of citation.

We hold that the trial court did not err on November 16, 1992 in denying Wife's motion to reconsider. We overrule her third point of error.

Due Process Guarantees

[9][10] In her fourth point of error, Wife contends that the trial court's exercise of jurisdiction over her violated her constitutional due process rights. When a party generally appears in a case before obtaining a favorable ruling on a special appearance, the trial court can exercise jurisdiction over the party without violating the party's due process rights. In this case, Wife generally appeared before presenting her amended special appearance. Accordingly, the trial court did not violate her due process rights. *See Temperature Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 677 (Tex.App. — Dallas 1993, *writ dism'd by agr.*); see also *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex.1985). We overrule Wife's fourth point of error.

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[4] Because the trial court was not presented with such a request, we need not rule on whether the denial of such a request would affect the specially appearing party's ability to amend the special appearance. That issue is not before us, and we make no ruling on the issue.

Jurisdiction over Marital Property

In her fifth and sixth points of error, Wife contends that the trial court erred in finding that it had jurisdiction to divide the couple's marital property located inside or outside Texas. Wife's argument on these points is dependent on our holding that the trial court lacked personal jurisdiction over Wife. Because we have ruled that the trial court did ***784** not err in asserting personal jurisdiction over Wife, these points lack merit. We overrule Wife's fifth and sixth points of error.

In her seventh point of error, Wife contends that the trial court erred in finding that it was not required to have in personam jurisdiction over Wife in order to divide the marital property. The trial court made no such finding.[5] In its Finding of Fact 3(b), the trial court found "that the Court has jurisdiction of all the parties and subject matter of the cause." We overrule Wife's seventh point of error.

MOTION TO QUASH SERVICE OF CITATION

[11] In her eighth point of error, Wife contends that the trial court erred in overruling her motion to quash service of citation. The statements of facts from the November 10 and 16, 1992 hearings show that the trial court overruled the motion to quash on the ground that it was moot because Wife had filed an answer in the case. Wife argues that the motion to quash was not moot because her answer was filed "subject to" the motion to quash.

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[5] Wife makes no citation to the record to support her assertion that the trial court made such a finding. *See* Tex.R.App.P. 74(d), (f). We have reviewed the record, and we have not discovered any such finding.

Rule 122 governs "constructive appearances" for the purpose of challenging defects in service of citation. That rule provides,

> If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a.m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at that time, and if he fails to do so, judgment by default may be rendered against him.

Tex.R.Civ.P. 122. The effect of this rule is that the defendant is deemed served when the trial court quashes the service or citation. The defendant obtains no benefit other than additional time to file an answer.

Wife argues that her answer's stating that it was filed "subject to" the motion to quash citation prevented the motion to quash the service of citation from being moot. She relies on two cases. In *London Assurance Corp. v. Lee*, 66 Tex. 247, 18 S.W. 508 (1886), and *Allright, Inc. v. Roper*, 478 S.W.2d 245 (Tex.Civ.App. — Houston [14th Dist.] 1972, *writ dism'd w.o.j.*), the defendants filed motions to quash service of citation. They also filed conditional answers stating that they were to be considered only if the motions to quash were denied. *London Assurance Corp.*, 66 Tex. at 248, 18 S.W. at 509; *Allright, Inc.*, 478 S.W.2d at 247. In both cases, the trial courts sustained the motions. In effect, the defendants never filed answers. The reviewing courts ruled that, because of the expressly conditional language of the answers that they were not to be relied on unless the motions were overruled and because the motions were sustained, the conditional answers did not serve as answers under those

facts. *London Assurance Corp.*, 66 Tex. at 248, 18 S.W. at 509; *Allright, Inc.*, 478 S.W.2d at 247.

[12] Wife's answer, however, does not state that it is to be considered only in the event that the motion to quash is overruled. It states only that it is "subject to hearings and determination of the three previous motions," *i.e.*, the plea in abatement, the plea to the jurisdiction of the court, and the motion to quash service of citation. Where defendants have stated only that the answer is "subject to" the motion to quash service of citation, the courts have held that the answer constitutes a general answer waiving the necessity for service as well as waiving any defects in the citation. *Parr v. First State Bank*, 507 S.W.2d 579, 581 (Tex.Civ.App. — San Antonio 1974, *no writ*); *Hickey v. Sibley*, 304 S.W.2d 165, 166 (Tex.Civ.App. — Waco 1957, *no writ*); *see also Bowen v. State*, 413 S.W.2d 915, 916 (Tex.Crim.App.1967) (bond forfeiture case holding answer filed "subject to" motion to quash service of citation constituted general answer). These cases show that for an answer to be conditional, the ***785** answer must expressly state the conditions under which it can be considered. Stating that an answer is "subject to" another pleading does not expressly state the conditions under which it can be considered. With the exception of a special appearance, such an answer may be considered for all purposes. Because Wife's answer was only "subject to" the motion to quash and was not expressly conditional on the overruling of the motion to quash, her answer was not conditional.

[13] Wife also argues that the provision of rule 120a that permits pleas and motions to be filed in the same instrument as the special appearance or filed after the special appearance without waiving it should apply to motions to quash service of citation under rule 122. *See* Tex.R.Civ.P. 120a(1). Wife cites no authority for this proposition. Nothing in rule 120a or rule 122 suggests that the procedure in rule 120a applies to

rule 122. The language of rule 120a is specific in its application to special appearances. *See* Tex.R.Civ.P. 120a. Wife's argument lacks merit.

Because Wife filed an unconditional answer, she waived service of process and any defects in the service. We hold that the trial court did not err in overruling her motion to quash service of citation. We overrule Wife's eighth point of error.

PLEA IN ABATEMENT

[14] In her ninth point of error, Wife contends that the trial court abused its discretion in failing to stay or abate the Texas divorce proceeding. Wife filed her divorce petition in California on April 10, 1992. On September 10, 1992, Husband filed for divorce in Texas and had Wife served with service of citation on September 14, 1992. Wife had husband served in the California case on October 16, 1992. Wife argues that because suit was first filed in California, the Texas court should have abated the suit until the California case was concluded.

[15] A motion to stay is directed to the discretion of the court, and the granting or denying of the motion will only be reviewed for abuse of discretion. *Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co.*, 794 S.W.2d 944, 946 (Tex.App. — Houston [1st Dist.] 1990, *no writ*); *Nowell v. Nowell*, 408 S.W.2d 550, 553 (Tex.Civ.App. — Dallas 1966, *writ dism'd*), *cert. denied*, 389 U.S. 847, 88 S.Ct. 53, 19 L.Ed.2d 116 (1967).

[16] The mere pendency of an action in one state will not be grounds for abating a suit in another state between the same parties and involving the same subject matter. As a matter of comity, however, it is customary for the court in which the later action is instituted to stay proceedings until the prior action is determined. The custom has practically

grown into a general rule that strongly urges the court in which the subsequent action is instituted to stay or abate its proceedings. *Space Master*, 794 S.W.2d at 946.

[17] The Texas Supreme Court has carved out an exception to this general rule. When the plaintiff unreasonably delays in serving process on the defendant, the trial court does not necessarily abuse its discretion in refusing to stay the later filed case. *See Reed v. Reed*, 158 Tex. 298, 311 S.W.2d 628, 631 (Tex.1958). In *Reed*, the husband filed for divorce in El Paso County. He waited more than fifteen months to have the wife served with process. In the meantime, the wife filed for divorce in Bexar County and had the husband served before she was served in the El Paso action. *Id.* at 629. The supreme court held that the Bexar County trial court did not abuse its discretion in overruling the husband's motion to stay the proceedings because the husband showed lack of diligence by unreasonably delaying having the wife served until after he was served in her divorce action. *Id.* at 630-31. In *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex.1974) *(orig. proceeding)*, the supreme court held as a matter of law that no unreasonable diligence occurred when the petitioner in the first suit did not have the respondent served until twenty-six days after filing suit. *Id.* at 268. The court found significant the fact that the respondent in the first suit did not file suit during the delay. *Id.*

In this case, Wife delayed six months before having Husband served. During the delay, Husband filed suit against Wife and had her served. Even after she was served in the Texas case, Wife waited more than a ***786** month to have Husband served in the California action. The trial court found that Wife "exercised no diligence in securing service of process upon [Husband] and did not attempt to effectively prosecute her case until after she was served with process in this action."

Wife argues, however, that Husband cannot assert her delay in serving him because of *Beckman v. Beckman,* 716 S.W.2d 83 (Tex.App. — Dallas 1986, *writ dism'd*). Wife then quotes from *Beckman:* "This court held that 'because [the wife's] reliance on [the husband's] representations that the Dallas County suit would be dismissed, a question of estoppel against [the husband] exists with respect to whether [the wife's] plea in abatement was seasonably raised.' " *Id.* at 86 (Wife's brackets). Beckman is not applicable. Nothing in the record shows that Husband told Wife he would dismiss the suit. Wife's only testimony concerning this issue was that he told her, before he was served with citation and before he had filed his divorce action, that he did not think they should get divorced. This statement does not constitute the sort of representation that could have excused Wife from serving Husband with process.

Wife also argues that she acted with diligence in having Husband served. She lists the following activities as diligence in serving Husband with process: "She hired a lawyer and paid a lawyer; instituted suit and had papers served, at least she thought, on [Husband] in Minnesota; was harassed by [Husband]; and interviewed anywhere from 15 to 16 attorneys once her lawyer withdrew. However, after the lawsuit was filed, [Wife] was [sic] forced to move into a shelter and lacked sufficient funds to more vigorously prosecute the lawsuit." With the exception of trying to serve Husband in Minnesota, none of these reasons constitute "diligence" in obtaining service of process. At best, they only constitute attempts at explanations for her lack of diligence. As for Wife's statement that she thought Husband had been served in Minnesota, she does not explain why she believed he had been served. Nor do the records from the California action show any attempt at service on Husband prior to October 1992.

Wife also argues for the first time on appeal that the trial court should have stayed the Dallas action because Husband had not been a resident of Texas for six months when he filed suit. Husband stated that he moved from Minnesota to Texas on March 10, 1992. Wife points to evidence showing that Husband was in Minnesota on March 10. The fact that Husband was in Minnesota on March 10 is not inconsistent with his testimony that he moved from Minnesota to Texas that day.

Wife has not shown that the trial court abused its discretion in overruling her motion to stay or abate the Dallas County action. We overrule Wife's ninth point of error.

CALIFORNIA DIVORCE

[18] In her sixteenth through twentieth points of error, Wife contends that the trial court erred in failing to give full faith and credit to the California divorce decree, finding that the California divorce decree was not final, failing to apply California law to determine the finality of the divorce decree, granting the divorce and attempting to divide the property because the parties had been divorced in California, and refusing to apply California law in dividing the property of the parties as required by section 3.91(b) of the Texas Family Code. On August 6, 1993, during the trial of this case in Dallas, the California court signed a judgment purporting to dissolve the marriage. A properly certified copy of the California divorce decree was presented to the trial court in this case on August 25, 1993. The trial court granted Wife's motion requesting the trial court to take judicial notice of California law.

[19] A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the statutes, rules, and court decisions of other states. Tex.R.Civ.Evid. 202.

The court's determination shall be subject to review as a ruling on a question of law. *Id.* In the absence of pleading and proof of the law of a sister state, it is presumed that the law of the state where the judgment was rendered is identical to the law of Texas. ***787** *See Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 465 n. 2 (Tex.1969); *Stine v. Koga*, 790 S.W.2d 412, 414 (Tex.App. — Beaumont 1990, *writ dism'd by agr.).*

This case requires a determination of the applicability of Texas and California statutes. Section 3.91(b) of the Texas Family Code provides, "if a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state even though the court had jurisdiction to do so, the court of this state shall apply the law of the other state . . . ." Tex.Fam.Code Ann. § 3.91(b) (Vernon 1993) (emphasis added). Section 4514 of the California Civil Code provides that a decree of marital dissolution is final notwithstanding the pendency of a motion for new trial or an appeal unless the movant or appellant objected to the dissolution at trial. *See* Cal.Civ.Code § 4514 (repealed, now codified at Cal.Fam.Code § 2341 (Deering 1994)). Wife argues that section 4514 of the California Civil Code means that the California court's divorce decree was a "final decree of divorce . . . rendered by a court in another state." *See* Tex.Fam.Code Ann. § 3.91(b) (Vernon 1993). She asserts that section 3.91(b) in this situation required the Texas court to apply California law to the distribution of the property. For purposes of this opinion, we will assume, without deciding, that the California divorce decree was a "final judgment" under California law of the marital dissolution of the parties. The finality of the decree alone is not sufficient to make section 3.91(b) applicable to this case. Section 3.91(b), by its terms, applies only when the foreign court failed to divide property even though it

had jurisdiction to do so. When the foreign court lacked jurisdiction to divide the property, section 3.92(b) provides that "a court of this state may . . . divide the property in a manner that the court deems just and right . . . ." Tex.Fam.Code Ann. § 3.92(b) (Vernon 1993).

In this case, Wife filed for bankruptcy protection before the California court entered its divorce decree.[6] The trial court in this case entered a finding that the California court did not divide the property, that the California court lacked jurisdiction to divide the property, and that the California court expressly reserved jurisdiction to divide the property. When Wife filed for bankruptcy protection, she deprived the California court of jurisdiction to divide any property in which she had an interest. *See Robbins v. Robbins*, 964 F.2d 342, 345 (4th Cir.1992); *In re Becker*, 136 B.R. 113, 115 (Bankr.D.N.J.1992). Because the California court did not have jurisdiction to divide the property, section 3.91(b) of the Texas Family Code was inapplicable. Under the facts of this case, neither section 3.91(b) nor section 3.92(b) required the Texas trial court to apply California law. We overrule Wife's sixteenth, seventeenth, eighteenth, and twentieth points of error.

[20][21] In her nineteenth point of error, Wife contends that the trial court erred in granting the divorce and in attempting to divide property because the parties had previously been divorced in California. We have already held that the California divorce decree did not deprive the Texas court of jurisdiction to divide the parties' property. We must now determine whether the trial court erred in entering a decree purporting to divorce the parties. Wife's argument is that the

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[6] The Texas trial court stayed proceedings in this case after the bankruptcy filing. After the automatic stay was lifted, the Texas trial court resumed the proceedings in this case.

California divorce decree was res judicata of the parties' marital status. Wife, however, never affirmatively pleaded res judicata. The failure to plead res judicata results in the waiver of its effect. *See Green v. Doakes*, 593 S.W.2d 762, 764 (Tex. Civ. App. — Houston [1st Dist.] 1979, *no writ*). Because Wife did not affirmatively plead that the California divorce decree was res judicata of the parties' marital status, the trial court did not err in entering a divorce decree. We overrule Wife's nineteenth point of error.

CHARACTERIZATION OF THE STARKEY STOCK

In her tenth through thirteenth points of error, Wife contends that the trial court erred in applying Texas law, instead of Minnesota law, to determine the characterization of the Starkey stock. Husband ***788** owned the stock before he was married. During the marriage, the stock increased greatly in value. Husband filed a partial motion for summary judgment asserting that the entire value of the corporation was his separate property as a matter of law because the shares were issued before marriage and he never divested himself of any of the shares or acquired additional shares during the marriage. The trial court granted the partial motion for summary judgment.

Standard of Review

[22][23][24] The function of a summary judgment is not to deprive a litigant of its right to a full hearing on the merits of any real issue of fact but is to eliminate patently unmeritorious claims and untenable defenses. *Gulbenkian v. Penn*,

151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). The standards for reviewing a motion for summary judgment are:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex.1984); *Wilcox v. St. Mary's Univ.*, 531 S.W.2d 589, 592-93 (Tex.1975). The purpose of the summary judgment rule is not to provide either a trial by deposition or a trial by affidavit but to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that no genuine issue of material fact remains. *Gaines v. Hamman*, 163 Tex. 618, 626, 358 S.W.2d 557, 563 (1962).

Choice of Law

The dispute on this issue is which state's laws apply to determine the characterization of the stock. Under the Texas Constitution and Minnesota statutes, the shares, to the extent of their value at the time of marriage, are Husband's separate property. *See* Minn.Stat.Ann. § 518.54(5)(b) (West Supp.1996) (" 'Nonmarital property' means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which ... (b) is acquired before the marriage ...."); Tex. Const. art. 16, § 15 ("All property, both

real and personal, of a spouse owned or claimed before marriage ... shall be the separate property of that spouse....''). The parties disagree about the characterization of the appreciation in value of the stock during the marriage.

[25][26][27][28] In Texas, separate property is considered in terms of the item itself, not in terms of its value. If separate property produces income, that income is community property. *See Bakken v. Bakken,* 503 S.W.2d 315, 317-18 (Tex.Civ.App. — Dallas 1973, *no writ*) (cash dividends from separate-property mutual fund are community property; capital gains distribution from separate-property mutual fund is separate property). However, an increase or decrease in the value of the item of separate property is an inherent part of the item and cannot be separated from it. *See Jensen v. Jensen,* 665 S.W.2d 107, 109 (Tex.1984); *Bakken,* 503 S.W.2d at 317-18. The community estate is entitled to reimbursement from the separate estate for improvements to the separate estate paid for by the community estate. If a spouse's separate estate is improved by the time, toil, and effort of one or both spouses, the community has an equitable claim for reimbursement for the reasonable value of the time, toil, and effort spent increasing the value of the spouse's separate estate. *Jensen,* 665 S.W.2d at 109; *Vallone v. Vallone,* 644 S.W.2d 455, 458-59 (Tex. 1982). The community is not entitled to reimbursement for increases in the value of separate property caused by market forces.

[29] In Minnesota, increases in the value of "nonmarital" property not attributable to the time, toil, and effort of one of the spouses are also "nonmarital." However, the Minnesota marital property scheme differs from the Texas scheme with regard to increases in value attributable to the time, toil, and effort ***789** of one of the spouses during the marriage. In Minnesota, any such increase is "marital" property and is subject to equitable division on divorce. *Nardini v.*

Nardini, 414 N.W.2d 184, 192 (Minn. 1987) ("[T]he increase in the value of nonmarital property attributable to the efforts of one or both spouses during their marriage . . . is marital property. Conversely, an increase in the value of nonmarital property attributable to inflation or to market forces or conditions, retains its nonmarital character."); *see also Berenberg v. Berenberg*, 474 N.W.2d 843, 846 (Minn. Ct. App. 1991) (*review denied*) (quoting Nardini).

Under Texas law, then, the entirety of the stock would be Husband's separate property.[7] Under Minnesota law, only the value of the corporation at the time of marriage, plus any increase in value during the marriage not attributable to the efforts of one or both spouses, would be Husband's "nonmarital" property. Any increase in value attributable to the efforts of one or both spouses would be "marital" property subject to equitable division on divorce.

Texas Family Code Section 3.63(b)

Prior to September 1, 1981, the characterization in Texas of personal property as either separate or community was determined by the characterization of the property in the state where the acquiring spouse resided at the time of acquisition. *See Ossorio v. Leon*, 705 S.W.2d 219, 222-23 (Tex.App. — San Antonio 1985, *no writ*). This rule resulted in some hardship to those whose spouses acquired property during the marriage in commonlaw states that classified such property as separate property. On moving to Texas and later dissolving the marriage, the Texas court would characterize and set aside

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[7] The community has no claim for equitable reimbursement in this case because the trial court found both spouses to have been adequately compensated for their time, toil, effort, and talent devoted to the operation of Starkey and to preserving and maintaining Husband's separate estate. *See Jensen*, 665 S.W.2d at 109-10. These findings are not challenged on appeal.

the property as separate property even though the property would have been subject to an equitable distribution in a divorce proceeding under the laws of the other state. *See Cameron v. Cameron*, 641 S.W.2d 210, 220-21 (Tex.1982). Two events eliminated this problem. The Texas Legislature passed section 3.63(b) of the Family Code. *See* Tex.Fam.Code Ann. § 3.63(b) (Vernon 1993);[8] *see also Cameron*, 641 S.W.2d at 221-22. Under that provision, property that would be classified as community property if the spouses had resided in Texas at the time of its acquisition is classified as community property on divorce in Texas regardless of the characterization of the property in the state of its acquisition. *See* Tex.Fam.Code Ann. § 3.63(b) (Vernon 1993). The Texas Supreme Court believed this approach to be so sensible that it adopted the rule for cases predating the statutory provision. *See Cameron*, 641 S.W.2d at 223. The second event occurred in 1984, when the Texas Supreme Court adopted section 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS in all cases except contract cases containing a choice-of-law provision. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[30] Husband asserts that section 3.63(b) operates as a comprehensive choice-of-law provision in property characteri-

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[8] Section 3.63(b) provides:

In a decree of divorce or annulment the court shall order a division of the following real and personal property wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition. Tex.Fam.Code Ann. § 3.63(b) (Vernon 1993).

zation issues. He argues that section 3.63(b)(1) should be read as providing that the characterization of property is dependent solely on Texas law. Under Husband's interpretation of section ***790** 3.63(b), if property is characterized as community property in the residential state of the acquiring party but would have been separate property if the parties had resided in Texas, then in a divorce proceeding in a Texas court, the property will be classified as separate property.

We disagree with Husband's sweeping interpretation of section 3.63(b). The statute by its terms acts only to expand, not restrict, the definition of community property. Nothing in the legislative history of the statute or the development of the law in this area suggests that section 3.63(b) was intended to expand the definition of separate property and thus restrict the extent of community property. Even the popular name for the statute, the "quasi-community" statute, suggests that it is intended to expand the definition of community property. *See Cameron*, 641 S.W.2d at 223; *Ismail v. Ismail*, 702 S.W.2d 216, 219 (Tex.App. — Houston [1st Dist.] 1985, *writ ref'd n.r.e.*). If the legislature had intended for the statute to be a comprehensive choice-of-law provision, it would not have phrased the statute as an expanded definition of community property.

Following *Duncan*, choice-of-law issues are decided under section 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *See Ossorio*, 705 S.W.2d at 223 (choice of law concerning property division after death of spouse); see also *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex.App. — Fort Worth 1985, *no writ*) (choice of law concerning validity of prior divorce and remarriage). Section 6 of the RESTATEMENT provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of the interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Because we have held that section 3.63(b) of the family code is not a comprehensive choice-of-law provision, and because there is no other applicable choice-of-law provision, we apply section 6(2) of the RESTATEMENT.

[31] The first factor, the needs of the interstate and international systems, is not affected in this case. The property at issue is a closely held corporation owned by a single stockholder who, through the trial, had not evinced any interest in selling the corporation.

The next two factors are the relevant policies of the forum state and other interested states. Minnesota's connection to the litigation is the fact that the parties were domiciled in Minnesota when they married and that Starkey is a Minnesota corporation. Neither party now lives in Minnesota.

Texas's connection to the lawsuit is that Husband now lives in Texas and he filed for divorce in Texas. Texas also has a policy of constitutional dimensions of protecting both separate and community property under its characterization scheme. *See* Tex.Fam.Code Ann. § 3.63(b) (Vernon 1993) (property characterized as community property regardless of characterization in other states); *Cameron*, 641 S.W.2d at 222 (judicially adopting section 3.63(b) as substantive law); *see also Cameron*, 641 S.W.2d at 219 (spouse cannot be divested of either personal or real separate property).

[32] The factor of protection of justified expectations concerns whether the parties have molded their conduct to conform to the requirements of a particular state. If the parties act without thought of the legal consequences, they have no justified expectations to protect and the factor cannot play a part in the decision of the choice-of-law question. ***791** *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. a (1971). Wife does not appear to have taken any actions in reliance on the application of Minnesota law. Assuming that Husband did not move to Texas for the sole purpose of taking advantage of this state's broader definition of separate property, he does not appear to have acted in reliance on Texas law. Accordingly, this factor does not play a part in our analysis.

[33] The basic policies underlying the particular field of law, division of spouses' property upon divorce, are similar. Both states try to divide property acquired during the marriage in a fair manner that compensates for any wrongs committed during the marriage. However, the states approach the problem of division of increase of value of separate or nonmaritial property attributable to the spouses' time, toil, and effort from different perspectives. In Minnesota, they simply divide that value as marital property. In Texas, however, an increase in an asset's value, however caused, is not property; the item itself,

with whatever value it has, is property. If the item is proved to be separate property, the Texas Constitution prohibits transformation of that item into community property. Texas requires the spouse whose separate estate has been improved by assets of the community estate, including both spouses' time, toil, and effort spent improving the separate estate, to reimburse the community estate for those assets and time, toil, and effort. Such reimbursement can take the form of salary to the spouses from a separate-property business or the community's receipt of other benefits from the separate estate. *See, e.g., Jensen*, 665 S.W.2d at 109-10.

The next factors are predictability and uniformity of result and ease in the determination and application of the law to be applied. These were two factors that led the Texas Legislature to pass section 3.63(b) and the supreme court to adopt it as the substantive law. *See Cameron*, 641 S.W.2d at 222. Applying Texas characterization principles to increases in value of separate property greatly simplifies the division of the parties' assets. Using the rule of domicile would require the courts to determine how much of the increased value attributable to the spouses' time, toil, and effort accrued while domiciled in a particular state. If a spouse were to change states frequently, determination of the applicable law and the applicable accrued value under that state's law would be a tremendous burden for any court and could be subject to unpredictable results.

The final factor under section 6 is reciprocity. Texas does not have a policy of reciprocation in the area of marital property. *See, e.g.*, Tex.Fam.Code Ann. § 3.63(b) (Vernon 1993) (property characterized as community property in Texas regardless of any other state's characterization). Thus, reciprocity is not a factor in this issue.

Weighing all these factors, we determine that Texas is the state with the most significant relationship to the action.[9] Accordingly, we apply Texas characterization principles and hold that the accrued value of the stock is not property apart from the stock itself.

Husband presented uncontroverted evidence that he owned the shares of Starkey before the marriage and that he owned them without interruption throughout the marriage. Accordingly, applying Texas characterization principles, the Starkey stock, with any value accrued during the marriage, is Husband's separate property. We hold that the trial court did not err in granting Husband's motion for summary judgment on this issue. We overrule Wife's tenth through thirteenth points of error.

VERIFICATION OF SUPPLEMENTAL DISCOVERY RESPONSES

In her fourteenth point of error, Wife contends that the trial court erred in ruling that supplemental discovery responses designating ***792** experts must be verified. Wife sought to present the testimony of Hanan to show the value of the Starkey corporation and the testimony of Dohmeyer to show the unreasonableness of Husband's and Wife's compensation from Starkey during the marriage. Wife attempted to designate in supplemental answers to interrogatories Hanan and Dohmeyer as experts on June 1, 1993 for a hearing held on July 1, 1993. Husband objected to the experts for four

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[9] Whether another State's law may have the most significant relationship under different facts is not before us. Accordingly, we make no holding that Texas is always the State with the most significant relationship in determining the characterization of accrued value of separate property. We also do not consider whether the Texas Constitution would prohibit the application of another state's characterization principles to characterize as community property an asset that would be separate property under Texas characterization principles.

reasons: (1) the supplemental answer designating them as experts was not verified; (2) the responses failed to fully disclose the opinions and conclusions of the experts; (3) Wife did not file the supplemental responses prior to thirty days before trial; and (4) Wife did not file the supplemental responses as soon as practicable. The court sustained Husband's objection and stated on the record that it did so because the supplemental answers were not verified.[10]

Texas Rule of Civil Procedure 168(5) requires that answers to interrogatories be in writing under oath. A party must supplement discovery responses when they are or become incomplete or incorrect. Tex.R.Civ.P. 166b(6)(a). Any supplementation regarding an expert witness must be made "as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court." Tex.R.Civ.P. 166b(6)(b). The failure to supplement the discovery response concerning an expert witness results in the exclusion of that expert's testimony unless the party offering the testimony shows good cause, on the record, for the failure to supplement. Tex.R.Civ.P. 215(5).

Rule 168(5) expressly requires that answers to interrogatories be sworn. That rule, however, does not expressly mention the requirements for supplemental answers to interrogatories. Rule 166b(6)(a), which discusses supplemental discovery responses, does not mention whether supplemental discovery responses must be sworn. *See* Tex.R.Civ.P.

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[10] The trial court's Finding of Fact 7(d) states:

[Wife], although fully aware of the issues regarding adequacy of compensation in this case and the value of Starkey Laboratories, Inc. as it may have been enhanced during marriage, was not forthcoming in her responses to proper discovery request asking for the identification of her testifying expert witnesses and that her answers in this case were not timely filed and that such answers were not verified or signed by [Wife] and that such answers identifying the experts were not made as soon as practical. The Court finds that such experts were hired in January 1993 and not disclosed until after May 31, 1993....

166b(6)(a). Two lines of cases exist on the issue of verification of supplemental answers to interrogatories.

In one line of cases, started by *Jones v. Kinder*, 807 S.W.2d 868 (Tex. App. — Amarillo 1991, *no writ*), the courts have held that verification of supplemental answers is not necessary because it does not further the twin goals of the discovery rules: "(1) 'to encourage full discovery of the issues and facts prior to trial so that the parties could make realistic assessments of their respective positions,' and (2) 'prevent trial by ambush.' " *Jones*, 807 S.W.2d at 873 (quoting respectively *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex.1989); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex.1992)); *see Soefje v. Stewart*, 847 S.W.2d 311, 314 (Tex.App. — San Antonio 1992, *writ denied*); *Kramer v. Lewisville Memorial Hosp.*, 831 S.W.2d 46, 48 (Tex.App. — Fort Worth 1992), *aff'd*, 858 S.W.2d 397 (Tex.1993); *Circle Y v. Blevins*, 826 S.W.2d 753, 756 (Tex.App. — Texarkana 1992, *writ denied*). The other line of cases, started by *Varner v. Howe*, 860 S.W.2d 458 (Tex.App. — El Paso 1993, *no writ*), holds that verification of supplemental answers is required if the original answers must be verified: "If the formalities of Rule 168 are mandatory . . ., then it logically follows that a supplementation to the answers previously given should observe the same formalities." *Varner*, 860 S.W.2d at 462; see also *Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex.App. — El Paso 1994, *no writ*).

[34] We agree with the *Varner* line of cases instead of the *Jones* line. Jones and its progeny base their argument on the fact that rule 166b(6) regarding supplementation does not contain a verification requirement. Rule 166b(6) applies to supplementation of all forms of discovery. Although some forms of ***793** discovery require that the evidence be sworn, such as answers to interrogatories and answers to depositions, other forms of discovery responses, such as responses to

requests for admission and responses to requests for production, do not have to be sworn. *See* Tex.R.Civ.P. 167(l), 168(5), 169(l), 204(2), 208(5). Because different forms of discovery have different verification requirements, including no verification requirement for some forms, it makes sense that the rule requiring supplementation of all forms of discovery would not dictate the form of supplemental responses. Thus, the fact that rule 166b(6) does not contain a verification requirement does not support the proposition espoused in *Jones* and its progeny that supplemental answers to interrogatories do not have to be verified. As the *Varner* court noted, the formalities necessary to respond originally to a request for discovery should apply to a supplemental response.

[35] Rule 168(5) requires that answers to interrogatories be sworn; accordingly, supplemental answers to interrogatories must also be sworn. Because Wife's supplemental answers to interrogatories were not sworn, her supplementation was invalid. We overrule Wife's fourteenth point of error.

GOOD CAUSE

[36] In her fifteenth point of error, Wife contends that the trial court erred in concluding that Wife did not show good cause to permit her experts to testify. She asserts that her testimony shows sufficient good cause for her failure to verify the supplemental answers.

[37][38] The determination of whether a party has shown good cause rests in the sound discretion of the trial court. *Alvarado,* 830 S.W.2d at 914. A reviewing court will not reverse a trial court on a matter in its discretion unless the record shows that the trial court acted without reference to any guiding rules or principles. *Morrow v. H.E.B. Inc.,* 714 S.W.2d 297, 298 (Tex.1986).

Wife testified that she was pursuing lawsuits in Texas and California and that she was overwhelmed by the paperwork that her lawyers submitted to her. In a previous hearing, which the trial court considered at the good-cause hearing, Wife's attorney testified that he had filed the supplement without Wife's signature because he had been unable to secure her signature. He testified that she had stopped communicating with him. He had sent the documents to Wife and to Wife's attorney in California for Wife to sign, but he did not receive the documents from her. He thought that Wife would be in his Dallas office before the hearing to sign the documents, but she did not appear in his office or at the hearing. The trial court stated at this hearing,

> I think [Wife's attorney] made every reasonable effort to secure [Wife's] signature on these documents, and from what I hear, communicated them both to the California counsel and directly to [Wife]....
>
> * * * * * *
>
> I'm not foreclosing the continuation of the good cause hearing. When we find out what [Wife's] good cause was for not signing the interrogatories that [her attorney] timely forwarded to her for her execution — I think we all, as trial lawyers and former trial lawyers, can think of scenarios in which someone might be incapacitated and unable to sign those documents....
>
> So the objection to the experts right now is sustained, and the Court will just continue the good cause hearing until we can develop whatever [Wife's] problems were in her inability to execute these documents.

At the subsequent hearing, Wife did not explain the reasons for her failure to communicate with her Dallas attorney or her failure to appear in her Dallas attorney's office

to sign the documents. She presented no evidence that the overwhelming paperwork left her incapacitated.

In *Alvarado v. Farah Manufacturing Co.*, the supreme court stated that the good-cause exception "permits a trial court to excuse a failure to comply with discovery in difficult or impossible circumstances." *Alvarado*, 830 S.W.2d at 914. The difficult circumstance preventing proper supplementation in this case was Wife's failure to sign the documents. This situation was not the result of ***794** any incapacitation of Wife but was caused by her unexplained refusal to communicate with her attorney. Under these circumstances, we cannot conclude that the trial court abused its discretion in ruling that Wife did not show good cause.

[39] Wife next argues that we should apply the standards set out in *TransAmerican Natural Gas Corp. v. Powell* in this case. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex.1991). The standards set out in TransAmerican concerned the review of death-penalty sanctions. *TransAmerican*, 811 S.W.2d at 916-19. Two intermediate appellate courts have extended the concept of death-penalty sanctions to the exclusion of expert witnesses for a party's failure to supplement discovery responses. *See Smart v. Winslow*, 868 S.W.2d 409, 415 (Tex. App. — Amarillo 1993, *no writ*); *Shell W.E & P, Inc. v. Partida*, 823 S.W.2d 400, 403-04 (Tex. App. — Corpus Christi 1992, *orig. proceeding*). We disagree with these cases. Rule 215(5) requires the trial court to exclude any evidence that a party failed to disclose in response to a proper discovery request. Tex.R.Civ.P. 215(5). This mandatory exclusion also applies to expert witnesses concerning whom a party fails to supplement a discovery response. Tex.R.Civ.P. 215(5). The sanction of exclusion is mandatory. *Alvarado*, 830 S.W.2d at 915. Application of the *TransAmerican* factors would be contrary to the clear lan-

guage of rule 215(5). *TransAmerican* is not applicable to this case.

We hold that the trial court did not err in concluding that Wife failed to show good cause for her failure to supplement the discovery responses. We overrule Wife's fifteenth point of error.

JUST AND RIGHT DIVISION

[40] In her twenty-first point of error, Wife contends that the trial court erred in its division of the community property because the division does not constitute a fair and just division but is manifestly unjust. She also contends that the trial court's finding of fact that the division was just and right is against the great weight and preponderance of the evidence.

[41][42][43][44][45][46] Section 3.63 of the Texas Family Code requires the trial court to order a division in a manner that it deems just and right, having due regard for the rights of each party. Tex.Fam.Code Ann. § 3.63(a) (Vernon 1993). A trial court has wide latitude and discretion in dividing the community estate of the parties upon dissolution of the marriage, and on appeal, this Court presumes that the trial court exercised its discretion properly. *Vallone,* 644 S.W.2d at 460. The trial court's exercise of discretion in dividing the marital estate will be disturbed on appeal only where, after reviewing the entire record, it appears that the division was so unfair and unjust as to constitute an abuse of discretion. *Vallone,* 644 S.W.2d at 460; *Belz v. Belz,* 667 S.W.2d 240, 245 (Tex.App. — Dallas 1984, *writ ref'd n.r.e.*). In making a just and right division of the community estate, the trial court must view the case in its entirety. *Smallwood v. Smallwood,* 548 S.W.2d 796, 797 (Tex.Civ.App. — Waco 1977, *no writ*). A trial court may be guided by factors such as the spouses' capacities and abilities,

benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex.1981). The trial court's ultimate division need not be equal as long as it is equitable and the circumstances justify a disproportionate division. *Thomas v. Thomas*, 525 S.W.2d 200, 202 (Tex.Civ.App. — Houston [1st Dist.] 1975, *no writ*). Each case must be examined on its own merits to determine whether an unequal distribution was justified. *Oliver v. Oliver*, 741 S.W.2d 225, 229 (Tex.App. — Fort Worth 1987, *no writ*).

The trial court awarded 55.59% of the community property to Wife and 44.40% of the community property to Husband.[11] The ***795** community estate was valued at $3,750,000. The trial court stated in its conclusions of law that the division of property was "based on the nature of the property, health of the parties, [and] future support needs ...." The trial court found that both parties were in good health and capable of continuing employment. The court also found that Wife was skilled in the hearing health care industry and earned more than $70,000 per year during the marriage in a number of management and executive positions. The trial court made the unequal division of property in Wife's favor "to provide her with a higher standard of living than she would have if the Court were to divide the property equally." The court intended the unequal division to help Wife meet her needs for future support.

Wife argues that "[t]he trial court's division and award in the decree of divorce, when taken with the trial court's

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[11] These percentages were those stated in the court's "Rendition" of October 17, 1993. The divorce decree and findings of fact and conclusions of law list the property awarded but do not contain percentages. The record does not clarify what happened to the remaining .01%.

findings and the evidence adduced at trial that [Husband] has a higher earning capacity than [Wife] and has tremendously more separate property than [Wife], renders the court's conclusions and judgment against the great weight and preponderance of the evidence and makes the judgment manifestly unjust." We have examined the record, and we conclude that the evidence supports the trial court's finding that its division was just and right. The division was not manifestly unjust.

Wife's remaining arguments depend on our sustaining her points contending that California or Minnesota law is controlling. Because we overruled these points, Wife's arguments lack merit. We overrule Wife's twenty-first point of error.

We affirm the trial court's judgment.

CHAPMAN, J., dissenting without opinion.

END OF DOCUMENT

968 S.W.2d 319
41 Tex. Sup. Ct. J. 400

Cynthia Lee DAWSON-AUSTIN, Petitioner,

v.

William Franklin AUSTIN, Respondent.

No. 96-0442.

Supreme Court of Texas.

Argued April 23, 1997.

Decided Feb. 13, 1998.
Rehearing Overruled July 3, 1998.

In divorce proceeding, the 301st District Court, Dallas County, Robert O'Donnell, J., issued decree of divorce. Wife appealed. The Court of Appeals, 920 S.W.2d 776, affirmed. Appeal was taken. The Supreme Court, Hecht, J., held that: (1) defect in unsworn special appearance could be cured by amendment to add verification after ruling on special appearance and before general appearance; (2) wife did not enter general appearance by filing unsworn special appearance or by amending it after it was overruled; (3) wife's motions and pleas made in same instrument with and subsequent to special appearance did not constitute general appearance; (4) wife's special appearance directed only to division of property claim did not constitute general appearance; (5) trial court had no basis to exercise personal jurisdiction over wife; and (6) fact that property was located in state as result of unilateral actions of husband did not supply minimum contacts required for exercise of jurisdiction over division of marital estate.

Judgment of the Court of Appeals reversed and case remanded to the District Court.

Baker, J., filed a dissenting opinion in which Enoch and Abbott, JJ., joined.

[1] APPEARANCE Key 9(1)
31k9(1)

Rule providing that special appearance may be amended to "cure" defects allows amendment of special appearance to add verification and thereby allow challenge of in personan jurisdiction. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a(l). See publication Words and Phrases for other judicial constructions and definitions.

[1] APPEARANCE Key 9(2)
31k9(2)

Rule providing that special appearance may be amended to "cure" defects allows amendment of special appearance to add verification and thereby allow challenge of in personan jurisdiction. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a(l). See publication Words and Phrases for other judicial constructions and definitions.

[2] APPEARANCE Key 9(1)
3lk9(l)

Defect in unsworn special appearance can be cured by amendment to add verification after ruling on special appearance, as long as amendment is filed before there is general appearance. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a(l).

[3] APPEARANCE Key 11.1
31kll.l

Unverified special appearance neither acknowledges court's jurisdiction nor seeks affirmative action and thus, while it cannot be used to disprove jurisdiction, it certainly does not concede it.

[3] APPEARANCE Key 19(3)
3lkl9(3)

Unverified special appearance neither acknowledges court's jurisdiction nor seeks affirmative action and thus, while it cannot be used to disprove jurisdiction, it certainly does not concede it.

[4] DIVORCE Key 81
134k8l

Wife did not enter general appearance in divorce action by filing unsworn special appearance or by amending it only after it was overruled.

[5] DIVORCE Key 81
134k8l

Wife's motion to quash service, plea to jurisdiction, and plea in abatement, all made in same instrument with special appearance and all following special appearance in instrument, were by rule subject to special appearance and did not constitute general appearance in divorce action, even though matters following special appearance were not expressly made subject to special appearance; overruling *Portland Sav. & Loan Ass'n v. Bernstein,* 716 S.W.2d 532. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a.

[6] DIVORCE Key 81
134k8l

Wife's motion for continuance was filed subsequent to her special appearance and thus was not general appearance in divorce action, under plain language of rule, and in light of wife's entitlement to request more time to prepare for special appearance hearing set by husband. Vernon's Ann.Texas Rules Civ.Proc., Rule 120a.

[7] DIVORCE Key 81
134k81

Wife's special appearance directed only to husband's claim seeking division of parties' property did not constitute general appearance on ground that division of marital estate claim was not severable from claim of divorce, in light of fact that trial court had jurisdiction to grant divorce and thus could have sustained special appearance only as to property division claim even if wife had specially appeared as to entire proceeding.

[8] DIVORCE Key 81
134k81

Fact that husband raised issue of wife's motion to quash service of process at conclusion of hearing on wife's unsworn special appearance did not constitute general appearance in divorce action by wife before she filed amended special appearance on next day; husband's counsel raised motion to quash, and trial court ruled it moot without word from wife's counsel, and only then asked wife's counsel whether he agreed, and he essentially conceded.

[9] DIVORCE Key 65
134k65

Trial court had no basis to exercise personal jurisdiction over wife for purposes of husband's petition for divorce, where wife had never been resident of state and where wife had no minimum, purposeful contacts with state; wife's only contact with state had been to attend business convention in state nine or ten years earlier. V.T.C.A., Family Code §6.305(a).

[10] DIVORCE Key 65
134k65

Mere fact that property claimed to be part of marital estate was located in state, solely as result of unilateral actions of husband, did not supply minimum contacts required for trial court to exercise jurisdiction over wife's claim to increase in value of husband's business during marriage or to divide marital estate upon divorce; husband moved to state, bought home, opened bank accounts, and brought stock certificate to state only after he separated from wife.

[11] DIVORCE Key 65
134k65

One spouse cannot, solely by actions in which other spouse is not involved, create contacts between state and other spouse necessary for jurisdiction over divorce action.

***320** David L. Evans, Jeffrey H. Kobs, Thomas M. Michel, Fort Worth, for petitioner.

Richard R. Orsinger, San Antonio, M.J. (Ike) Vanden Eykel, Dallas, John J. Sampson, Russell J. Weintraub, Austin, Harry L. Tindall, Houston, for respondent.

HECHT, Justice, delivered the opinion of the Court in which PHILLIPS, Chief Justice, GONZALEZ, SPECTOR, OWEN, and HANKINSON, Justices, joined.

The issues we address in this divorce action are whether the district court had in personam jurisdiction over the wife, and if not, whether the court nevertheless had jurisdiction to divide the marital estate. The court of appeals upheld personal jurisdiction. 920 S.W.2d 776. We disagree.

I

Since 1970, William Franklin Austin has been the president, chief executive officer, sole director, and sole stockholder of Starkey Laboratories, Inc., a Minnesota corporation in the business of manufacturing and distributing hearing aids. In 1977, Austin met Cynthia Lee Dawson at a seminar in Oregon, where she was living, and persuaded her to come to work for Starkey at its headquarters in Minnesota. Austin was 35 years old and divorced, and Dawson was 30 years old and separated from her husband. Dawson soon moved into Austin's Minnesota home and continued working for Starkey. On a business trip to China in 1980, Austin and Dawson recited marriage vows in a Beijing restaurant. Two years later they filed a marriage certificate in Minnesota. At some point Dawson assumed the surname, Dawson-Austin.

Dawson-Austin worked for Starkey until shortly after she and Austin separated in 1992. Over the years the business had grown. In 1980 Starkey was worth about $1.5 million with some $12 million in net revenues. By 1992 the company had become the second largest manufacturer of hearing aids in the world with sales totaling more than $200 million and a net worth of at least $40 million.

Throughout the marriage the couple's principal residence was in Minnesota, although they also owned homes elsewhere, including ***321** one they acquired in California in 1984. They never resided in Texas, and neither of them ever came to the state except on business, and then only a few times. When they separated in February 1992, Dawson-Austin was living in their California home, and she remained there. Austin moved to Texas on March 10. On April 10 Dawson-Austin filed for divorce in California but did not serve Austin until October 16. Austin filed for divorce in Texas on September 10, the first day he could do so under Texas law, Tex.

Fam.Code § 6.301 (formerly Tex. Fam.Code § 3.21), and served Dawson-Austin four days later.

Dawson-Austin filed a special appearance and an amended special appearance, both of which the district court overruled. Dawson-Austin requested the court in dividing the couple's property to apply Minnesota law, under which she contends she would be entitled to a part of the increase in value of petitioner's Starkey stock attributable to the efforts of either spouse. The court refused and instead applied Texas law, holding that the stock was Austin's separate property subject only to any right of reimbursement of the community estate. The district court also struck Dawson-Austin's two expert witnesses retained to testify on the value of the community and its right of reimbursement, on the grounds that they were not timely identified in discovery. In a bench trial, Austin stipulated to Dawson-Austin's valuation of the community estate at $3,750,000. The court awarded Dawson-Austin 55.59% of the community — a little over $2 million.

Dawson-Austin appealed. The court of appeals in its initial opinion reversed the decree, holding that Minnesota law should have been applied in dividing the marital estate. On rehearing, however, a divided court of appeals affirmed the decree in all respects. 920 S.W.2d 776.

II

We first consider whether, as a matter of procedure, Dawson-Austin made a general appearance in the case.

Dawson-Austin filed pro se a single instrument including a special appearance, a motion to quash service of citation, a plea to the jurisdiction of the court, a plea in abatement, and subject to all of the above, an original answer. Only the answer was expressly made subject to the special appearance; the motion and pleas were not. The instrument contained a

verification of the facts and allegations stated in each component of the instrument except the special appearance. Dawson-Austin contends that the failure to include the special appearance in the verification was a typographical error. The district court overruled Dawson-Austin's special appearance because it was not sworn as required by Rule 120a(1), Tex.R. Civ. P., and because a motion to quash service of citation, plea to the jurisdiction, and plea in abatement, all included in the same instrument with the special appearance, were not expressly made subject to the special appearance.

The day after the court's overruling of the special appearance, Dawson-Austin filed a motion for reconsideration and an amended special appearance. The court denied the amended special appearance "on the merits", in the court's words, and did not rule on the motion to reconsider.

The court of appeals held that Dawson-Austin's special appearance was properly overruled because it was unsworn. The court did not consider whether the other pleadings in the same instrument should have been expressly subjected to the special appearance. 920 S.W.2d at 782. The court also held that Dawson-Austin waived her amended special appearance because, before it was filed, Dawson-Austin argued her motion to quash and did not object to the district court's consideration of it. 920 S.W.2d at 782-783.

Austin argues that there are yet other reasons, in addition to those given by the lower courts, for concluding that Dawson-Austin made a general appearance in the proceeding. We address each of these arguments in turn.

A

[1] As the lower courts both held, an unsworn special appearance does not comply with Rule 120a(1), Tex.R. Civ. P., and thus is *322 ineffectual to challenge in personam

jurisdiction. The lower courts also held, however, that the lack of verification can be cured by amendment. Austin argues that an unsworn special appearance cannot be cured and is itself a general appearance. Austin's argument is contrary to the express provision of Rule 120a(1) that a special appearance "may be amended to cure defects". By "cure", the rule means to restore the special appearance. The rule does not limit the kinds of defects that can be cured. The absence of a verification is such a defect, and an amendment that adds a verification cures the special appearance. Every court that has considered the issue agrees. *See Villalpando v. De La Garza,* 793 S.W.2d 274, 275-276 (Tex.App. — Corpus Christi 1990, *no writ*); *Carbonit Houston, Inc. v. Exchange Bank,* 628 S.W.2d 826, 828 (Tex.App. — Houston [14th Dist.] 1982, *writ ref'd n.r.e.*); *Stegall & Stegall v. Cohn,* 592 S.W.2d 427, 429 (Tex.App. — Fort Worth 1979, *no writ*); *Dennett v. First Continental Inv. Corp.,* 559 S.W.2d 384, 385-386 (Tex.App. — Dallas 1977, *no writ*).

[2] Austin argues, alternatively, that even if an unsworn special appearance can be cured by amendment, the amendment must be filed before the special appearance is ruled on. This argument, too, finds no footing in Rule 120a(1). The rule simply does not require that an amendment be filed before a ruling on the special appearance, as long as the amendment is filed before there is a general appearance. *See Dennett,* 559 S.W.2d at 386 ("[T]he crucial focus is on the allowance of amendment, and the timing of the amendment is not determinative.") (emphasis in original).

[3] Austin's arguments are not only contradicted by both the language and silence of Rule 120a, they misperceive what constitutes a general appearance. One court has explained:

> A party enters a general appearance whenever it invokes the judgment of the court on any question other than the court's jurisdiction; if a defendant's act recog-

nizes that an action is properly pending or seeks affirmative action from the court, that is a general appearance.

Moore v. Elektro-Mobil Technik GmbH, 874 S.W.2d 324, 327 (Tex.App. — El Paso 1994, *writ denied*). Another court has stated the same proposition in the negative:

> "[A]lthough an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court."

Investors Diversified Servs., Inc. v. Bruner, 366 S.W.2d 810, 815 (Tex.Civ.App. — Houston 1963, *writ ref'd n.r.e.*) (quoting 6 C.J.S. Appearances § 13 (19)); *see also Letersky v. Letersky*, 820 S.W.2d 12, 13 (Tex.App.— Eastland 1991, *no writ*); *United Nat'l Bank v. Travel Music, Inc.*, 737 S.W.2d 30, 32-33 (Tex.App. — San Antonio 1987, *writ ref'd n.r.e*). These courts have accurately restated the principle underlying a general appearance. An unverified special appearance neither acknowledges the court's jurisdiction nor seeks affirmative action. While it cannot be used to disprove jurisdiction, it certainly does not concede it.

[4] Thus, Dawson-Austin did not enter a general appearance by filing an unsworn special appearance or by amending it only after it was overruled.

B

[5] Austin argues that Dawson-Austin made a general appearance by filing a motion to quash service, a plea to the jurisdiction, and a plea in abatement, all in the same instrument with the special appearance and all following the special appearance in the instrument, but none expressly made subject to the special appearance. The district court agreed with this

argument; the court of appeals did not address it. The argument is contrary to Rule 120a, which states: "a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance". The rule makes matters in the same instrument and subsequent matters subject to the special appearance without an express statement to that effect for each matter.

***323** A few courts have referred to other matters being made subject to a special appearance but do not hold that "subject to" language is required to avoid waiver. *See International Turbine Serv., Inc. v. Lovitt,* 881 S.W.2d 805, 808 (Tex.App. — Fort Worth 1994, *writ denied*); *Koch Graphics, Inc. v. Avantech, Inc.,* 803 S.W.2d 432, 433 (Tex.App. — Dallas 1991, *no writ*); *Stegall & Stegall,* 592 S.W.2d at 429; *Frye v. Ross Aviation, Inc.,* 523 S.W.2d 500, 502 (Tex.Civ.App. — Amarillo 1975, *no writ*). Only two courts have addressed whether "subject to" language is required. In *Antonio v. Marino,* 910 S.W.2d 624, 629 (Tex.App. — Houston [14th Dist.] 1995, *no writ*), the court held that filing a stipulation without making it subject to the special appearance did not waive the special appearance. In *Portland Sav. & Loan Ass'n v. Bernstein,* 716 S.W.2d 532, 534-535 (Tex.App. — Corpus Christi 1985, *writ ref'd n.r.e.*), *cert. denied,* 475 U.S. 1016, 106 S.Ct. 1200, 89 L.Ed.2d 313 (1986), the court held that motions for sanctions and to disqualify counsel that were not filed subject to the special appearance did not "comply with Rule 120a" and therefore constituted a general appearance. Portland is contrary to the plain language of Rule 120a and to that extent is overruled.

Because Dawson-Austin's motion and pleas fully complied with Rule 120a, they did not constitute a general appearance.

C

The hearing on Dawson-Austin's special appearance, motion to quash service of process, plea to the jurisdiction, and plea in abatement was requested by Austin, not Dawson-Austin, because he wished the Texas court to proceed before the California court. As Austin's counsel told the district court, "we can't protect ourselves against the California lawsuit if we don't proceed today." Dawson-Austin did not ask the district court for a hearing on any of the matters she filed. On the contrary, Dawson-Austin filed a motion for continuance the day of the hearing on the grounds that she had not been given the requisite notice for the hearing, her counsel had just been hired to make an appearance and he was in a jury trial at the time of the hearing, discovery was needed on the special appearance, and discovery was needed on the motion to quash. Dawson-Austin's counsel reurged the motion for continuance throughout the hearing, and also requested a postponement because of Austin's and Dawson-Austin's unavailability to testify. The district court denied the continuance.

[6] Austin argues that Dawson-Austin's motion for continuance was not made subject to the special appearance and was therefore a general appearance. The district court appears to have rejected this argument, and the court of appeals did not address it. Austin's argument is incorrect for several reasons. First, as already discussed, Rule 120a expressly states that pleadings and motions may be "filed subsequent [to a special appearance] without waiver of such special appearance". Dawson-Austin's motion for continuance was filed subsequent to her special appearance and thus, by the plain language of the rule, was not a general appearance. Second, the motion for continuance did not request affirmative relief inconsistent with Dawson-Austin's assertion that the district court lacked jurisdiction, which, as we have noted, is

the test for a general appearance. Rather, the motion asked the court to defer action on all matters. Third, the motion was particularly appropriate, given that Austin, not Dawson-Austin, set the matters for hearing. Dawson-Austin was obliged to request that hearing of her motion and pleas be deferred until after the special appearance. Rule 120a(2) states: "Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard." She could not request a postponement of the special hearing without also requesting a postponement of her other matters on which Austin, not Dawson-Austin, had requested a hearing. Dawson-Austin was also entitled to seek a postponement of the special appearance hearing until she could complete discovery, as expressly permitted by Rule 120a, and she was entitled to ask for more time for discovery on her motion to quash, provided she did not attempt to take that discovery before the special appearance was decided.

***324** Dawson-Austin was entitled to request more time to prepare for the special appearance hearing that Austin set. Her request to postpone consideration of her other matters was required if the special appearance hearing were to be delayed. Dawson-Austin's motion for continuance in no way constituted a general appearance.

D

Both Dawson-Austin's special appearance and her amended special appearance stated: "This special appearance is made to the severable claim asserted by BILL wherein BILL seeks a division of the parties' property." In other words, Dawson-Austin specially appeared only with respect to the claim for division of the marital estate, not the claim for divorce. (Since the couple had no children, these were the only two claims in the proceeding.) Rule 120a permits a

special appearance to be made "as to an entire proceeding or as to any severable claim involved therein." It is well settled in this State that the division of a marital estate is not a claim severable from the rest of a divorce proceeding. Tex. Fam.Code § 7.001 ("In a decree of divorce or annulment, the court shall order a division of the estate of the parties ..." (emphasis added)) (formerly Tex. Fam.Code § 3.63(a)). *See, e.g., Hollaway v. Hollaway,* 792 S.W.2d 168, 170 (Tex.App. — Houston [1st Dist.] 1990, *writ denied*); *Vautrain v. Vautrain,* 646 S.W.2d 309, 314 (Tex.App. — Fort Worth 1983, *writ dism'd*). Thus, Austin argues that Dawson-Austin's special appearance to a non-severable portion of the proceeding constituted a general appearance.

The cases that hold adjudication of divorce and division of the marital estate to be non-severable claims all do so in the context of Rules 41 ("Misjoinder and Non-Joinder of Parties"), 174 ("Consolidation; Separate Trials"), and 320 ("Motion [for New Trial] and Action of Court Thereon"), TEX. R. CIV. P. *See, e.g., Brown v. Brown,* 917 S.W.2d 358, 360-365 (Tex.App. — El Paso 1996, *no writ*) (McClure, J., concurring); *Biaza v. Simon,* 879 S.W.2d 349, 355 (Tex.App. — Houston [14th Dist.] 1994, *writ denied*); *Hollaway,* 792 S.W.2d at 170; *Seibert v. Seibert,* 759 S.W.2d 768, 769-770 (Tex.App. — El Paso 1988, *writ denied*); *Dewey v. Dewey,* 745 S.W.2d 514, 516 (Tex. App. — Corpus Christi 1988, *writ denied*); *Odom v. Odom,* 683 S.W.2d 135, 137 (Tex.App. — San Antonio 1984, *writ ref'd n.r.e.*); *Vautrain,* 646 S.W.2d at 313-317; *Underhill v. Underhill,* 614 S.W.2d 178, 181 (Tex.Civ.App. — Houston [14th Dist.] 1981, *writ ref'd n.r.e.*); *In re Marriage of Johnson,* 595 S.W.2d 900, 902-904 (Tex.Civ.App. — Amarillo 1980, *writ dism'd w.o.j.*); *Garrison v. Texas Commerce Bank,* 560 S.W.2d 451, 453-457 (Tex.Civ.App. — Houston [1st Dist.] 1977, *writ ref'd n.r.e.*); *Reed v. Williams,*

545 S.W.2d 33, 34 (Tex.Civ.App. — San Antonio 1976, *no writ*); *Angerstein v. Angerstein,* 389 S.W.2d 519, 520-521 (Tex.Civ.App. — Corpus Christi 1965, *no writ*).

[7] No case holds that claims of divorce and division of property do not involve severable jurisdictional issues. The United States Supreme Court recognized long ago that a court could have jurisdiction to grant a divorce — an adjudication of parties' status — without having jurisdiction to divide their property — an adjudication of parties' rights. *Estin v. Estin,* 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948). The rule has been recognized in Texas, as one court has explained:

> Where the trial court in a divorce proceeding has no personal jurisdiction over the respondent, the trial court has the jurisdiction to grant the divorce, but not to determine the managing conservatorship of children or divide property outside the State of Texas. *Comisky v. Comisky,* 597 S.W.2d 6, 8 (Tex.Civ.App. — Beaumont 1980, *no writ*). It may also lack jurisdiction to divide property within the state. *See Shaffer v. Heitner,* 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683 (1977).

Hoffman v. Hoffman, 821 S.W.2d 3, 5 (Tex.App. — Fort Worth 1992, *no writ*). The court in Hoffman held that a special appearance directed to an entire divorce proceeding should have been sustained only as to the claim for division of property:

> [T]he trial court erred in dismissing [the husband's] divorce petition for want of jurisdiction, even though it might not have jurisdiction to deal with the property of the parties. The special appearance ***325** should only have been granted to the extent of the trial court's recognition that it does not have personal jurisdiction over [the wife] and therefore may not divide the property

of the parties located outside the State of Texas and possibly that located within the State of Texas.

Id. Section 6.308 of the Family Code now provides:

> (a) A court in which a suit for dissolution of a marriage is filed may exercise its jurisdiction over those portions of the suit for which it has authority.
>
> (b) The court's authority to resolve the issues in controversy between the parties may be restricted because the court lacks:
>
> > (1) the required personal jurisdiction over a nonresident party in a suit for dissolution of the marriage ....

Had Dawson-Austin specially appeared as to the entire proceeding, the district court could not have sustained it except as to the property division claim. The district court had jurisdiction to grant the divorce, and Dawson-Austin could not specially appear to that claim. If the court could sustain the special appearance as to only the one claim and not the other, directing the special appearance only to the claim for which it could be sustained could not be a general appearance.

E

Finally, Austin argues and the court of appeals held that Dawson-Austin, by asserting her motion to quash service of process at the conclusion of the hearing on her special appearance, made a general appearance before filing her amended special appearance the next day. The record does not support this argument.

[8] Again, it must be recalled that Austin, not Dawson-Austin, requested the hearing on the motion to quash, along with the special appearance and Dawson-Austin's other matters, and insisted on going forward. Dawson-Austin did not

raise any of the matters at the hearing; on the contrary, Dawson-Austin, as has been noted, repeatedly requested a postponement as to all of them. As soon as the district court overruled Dawson-Austin's special appearance, the following colloquy occurred:

> [Austin's Attorney]: Your Honor, if I may, I would like to proceed on their — They have a motion before the Court to quash the process in this case, and I —
>
> THE COURT: Let me ask you this. We don't get that a lot, but I thought that under the rules if you filed a Motion to Quash the service of process and the Court quashes the service of process, then that day becomes the day you're served, and then you have the Monday next after the expiration of twenty days for service from that day to file your Answer.
>
> [Austin's Attorney]: Process is moot at this point.
>
> THE COURT: But they have already filed their Answer.
>
> [Austin's Attorney]: Process is moot at this point because they filed an Answer. So actually we don't need to approach that question.
>
> THE COURT: Okay, I agree. Do you disagree with that?
>
> [Dawson-Austin's Attorney]: Yes, Your Honor, because there's no — the construction of pleadings is that you can have it all contained in the same pleadings.
>
> THE COURT: No, I'm not talking about that.
>
> I'm talking — I'm only talking about the Motion to Quash the Citation. If you have a bad citation and you come into court and get the citation quashed, then the

day the Court quashes your citation is the day you're served.

[Dawson-Austin's Attorney]: That's right.

THE COURT: Right?

[Dawson-Austin's Attorney]: So we —

THE COURT: Then you have until the Monday next to file an Answer.

[Dawson-Austin's Attorney]: Plus twenty.

THE COURT: Am I with you? Or are you with me?

[Dawson-Austin's Attorney]: Yes, Your Honor.

THE COURT: But she's already filed.

*326 [Dawson-Austin's Attorney]: Well, Your Honor, if it's bad service — if it's a bad service, then — and that's the way the motion is presented to the Court that it's a bad service, and if you were to quash it today, then she would have twenty days plus a Monday to enter the Answer, because —

THE COURT: I wouldn't be quashing her general denial. She's already filed a general denial.

[Dawson-Austin's Attorney]: She hasn't waived, Your Honor, unless the Court is ruling that she waived it, that by presenting it in a pleading to the Court.

THE COURT: Oh, that the general denial is subject to the ruling?

[Dawson-Austin's Attorney]: Yes, Your Honor.

THE COURT: Well, I don't think that waived it, but I think the fact that — I think that the intrinsic deficiencies in her Special Appearance waives it. I think she does become here at that point.

> [Austin's Attorney]: Your Honor, then that being the case, that was the only other motion we wanted to urge today.

As the record shows, Dawson-Austin's counsel did not raise or argue the motion to quash or any other matter. Austin's counsel raised the motion to quash, and the court ruled it moot without a word from Dawson-Austin's counsel. Only then did the court ask Dawson-Austin's counsel whether he agreed, and he essentially conceded. Nothing else transpired before the filing and hearing of Dawson-Austin's amended special appearance. Thus, the district court properly considered the special appearance on the merits.

III

A

However, the district court erred in overruling Dawson-Austin's amended special appearance. Section 6.305(a) of the Family Code provides:

> If the petitioner in a suit for dissolution of a marriage is a resident or a domiciliary of this state at the time the suit for dissolution is filed, the court may exercise personal jurisdiction over the respondent or over the respondent's personal representative although the respondent is not a resident of this state if:
>
> (1) this state is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which marital residence ended; or
>
> (2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

Tex. Fam.Code § 6.305(a) (formerly Tex. Fam.Code § 3.26(a)). Austin had been domiciled in Texas exactly six months to the day when he filed suit for divorce. *See id.* § 6.301 ("A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been . . . a domiciliary of this state for the preceding six-month period . . .") (formerly Tex. Fam.Code § 3.21). Dawson-Austin, however, neither was nor ever had been a Texas resident. Thus the district court did not have in personam jurisdiction over Dawson-Austin unless it was under Section 6.305(a)(2).

[9] The United States Constitution permits "a state court [to] take personal jurisdiction over a defendant only if it has some minimum, purposeful contacts with the state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice." *CMMC v. Salinas,* 929 S.W.2d 435, 437 (Tex.1996) (citing cases); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Dawson-Austin had no "minimum, purposeful contacts" with Texas. At the time Austin filed suit, Dawson-Austin resided in California, as Austin's petition itself alleged. She was served in California. At the hearing on her amended special appearance, she testified unequivocally and without contradiction from Austin that her only contact with the State of Texas had been to attend a business convention nine or ten years earlier. She had never lived in Texas, and Austin had not lived here before March 1992. There was no basis for the district court to exercise personal ***327** jurisdiction over Dawson-Austin, and Austin does not contend otherwise.

B

Even though the district court did not have in personam jurisdiction over Dawson-Austin, it is possible under the

United States Constitution, and thus under Texas law, for the court to have had jurisdiction to divide the marital estate located in Texas. The property in Texas in which the parties claimed an interest was Austin's Dallas home and Texas bank accounts, which the parties agreed was community property, and the stock certificate evidencing Austin's shares in Starkey. As we have previously stated, Austin contends that his Starkey stock is separate property, while Dawson-Austin claims that she is entitled under Minnesota law to part of the increase in value of the stock attributable to her and Austin's efforts during marriage.

In *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877), the United States Supreme Court held that a state court could exercise jurisdiction over property within the state's borders and determine the rights and interests of non-residents. But in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the Court abandoned this position and concluded instead that jurisdiction over property, like jurisdiction over persons, must be based on minimum, purposeful contacts and must not offend traditional notions of fair play and substantial justice:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.

Id. at 212, 97 S.Ct. at 2584. Shaffer was a shareholder derivative suit against officers and directors of two Delaware corporations. A Delaware court sequestered defendants' stock

in the corporations, even though neither defendants nor their stock were physically present in Delaware, basing its jurisdiction to do so on a Delaware statute that deemed Delaware the situs of ownership of all stock in Delaware corporations. *Id.* at 192, 97 S.Ct. at 2573. The Supreme Court held that neither defendants nor their stock had sufficient contacts with Delaware to justify the state court's exercise of jurisdiction over them. *Id.* at 213-217, 97 S.Ct. at 2584-2587.

[10][11] In the present case, the location in Texas of property that either is or is claimed to be part of the marital estate does not supply the minimum contacts required for the court to exercise jurisdiction over Dawson-Austin. Austin bought his Dallas home, opened his Texas bank accounts, and brought his Starkey stock certificate to Texas after he separated from Dawson-Austin. We do not believe that one spouse may leave the other, move to another state in which neither has ever lived, buy a home or open a bank account or store a stock certificate there, and by those unilateral actions, and nothing more, compel the other spouse to litigate their divorce in the new domicile consistent with due process. One spouse cannot, solely by actions in which the other spouse is not involved, create the contacts between a state and the other spouse necessary for jurisdiction over a divorce action. *See In the Interest of S.A.V.*, 837 S.W.2d 80, 83-84 (Tex.1992) (holding that without personal jurisdiction over one parent, a court could still decide custody of a child living in the State, but could not determine support and visitation). Moreover, Dawson-Austin's claim to a part of the value of the Starkey stock is completely unrelated to the situs of the certificate; rather, it is based on the parties' efforts to increase the value of Starkey, most of which occurred in Minnesota. In no sense can it be said that Dawson-Austin ever "purposefully availed" herself of the privilege of owning property in this State. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct.

2174, 2183-2184, 85 L.Ed.2d 528 (1985) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-1240, 2 L.Ed.2d 1283 (1958)).

***328** Thus, the district court lacked jurisdiction to adjudicate Dawson-Austin's claim to part of the value of the Starkey stock or to divide the marital estate.

* * * * *

The district court had jurisdiction only to grant a divorce and not to determine the parties' property claims. Accordingly, the judgment of the court of appeals is reversed and the case is remanded to the district court for rendition of judgment divorcing Austin and Dawson-Austin and dismissing all other claims for relief for want of jurisdiction.

BAKER, Justice, joined by ENOCH and ABBOTT, Justices, dissenting.

I respectfully dissent. After determining that it had jurisdiction, the trial court dissolved the parties' marriage, characterized Austin's Starkey Corporation stock as his separate property, and distributed about fifty-five percent of the community estate to Dawson-Austin and about forty-five percent to Austin. The court of appeals affirmed the trial court's judgment.[1] I would affirm the court of appeals.

I. BACKGROUND

Austin is the president of Starkey Laboratories, a Minnesota corporation. He owns sixty shares of Starkey stock, representing 100 per cent ownership. Austin owned the Starkey stock before he married Dawson-Austin. When Austin and Dawson-Austin married, they were domiciled in Minnesota. After continuing marital discord, they separated. There

[1] Justice Chapman dissented without an opinion.

are no children of the marriage. Consequently, jurisdiction under Chapters 102, 152 or 159 of the Texas Family Code is not at issue.

The parties remained domiciled in Minnesota until just before this suit. In February 1992, Dawson-Austin moved to California. In March 1992, Austin moved to Texas. Dawson-Austin filed for divorce in California, but she did not obtain service on Austin for several months. After residing in Texas for six months, and before Dawson-Austin served him in the California divorce action, Austin filed for divorce in Texas. Austin had Dawson-Austin served four days later.

In response to Austin's petition, Dawson-Austin filed, in one instrument: (1) a special appearance; (2) a motion to quash service of citation; (3) a plea to the jurisdiction; (4) a plea in abatement; and (5) subject to all of these, a general denial. On the day of the hearing for these motions, Dawson-Austin filed a motion for continuance. The trial court denied the motion for continuance, denied the special appearance because it was not verified, and proceeded to hear Dawson-Austin's motion to quash, which it also denied. The next day, Dawson-Austin amended her special appearance and moved for reconsideration. After another hearing a few days later, the trial court denied Dawson-Austin's motion for reconsideration.

II. SPECIAL APPEARANCE

The court of appeals held that the trial court properly overruled Dawson-Austin's original special appearance because it was unverified, and therefore defective. The court of appeals also held that because Dawson-Austin made a general appearance to argue other matters before filing her amended special appearance, the trial court properly overruled Dawson-Austin's amended special appearance and acquired jurisdic-

tion. Dawson-Austin argues that the court of appeals erred when it held that she waived her special appearance by arguing her motion to quash after the trial court overruled her original special appearance.

A. RULE 120a

An objection to a Texas court's exercise of jurisdiction over a nonresident must be made by special appearance filed under Rule 120a of the Texas Rules of Civil Procedure. Rule 120a requires "strict compliance." *See Portland Sav. & Loan Ass'n v. Bernstein,* 716 S.W.2d 532, 534 (Tex.App. — Corpus Christi 1985, *writ ref'd n.r.e.*). A special appearance must be made and determined on sworn motion prior to any other plea, pleading, or motion that seeks affirmative relief. *See* Tex.R. Civ. P. 120a(1) and (2); *Liberty Enters.,* ***329** *Inc. v. Moore Transp. Co.,* 690 S.W.2d 570, 571-72 (Tex.1985). Any appearance not in compliance with Rule 120a is a general appearance. *See* Tex.R. Civ. P. 120a(1); *Portland Sav. & Loan Ass'n,* 716 S.W.2d at 534; *see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 n. 14, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) ("the personal jurisdiction requirement is a waivable right"). When a party generally appears, the trial court can exercise jurisdiction over the party without violating the party's due process rights. *See Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 201 (Tex. 1985); *see also* Tex. Fam.Code § 6.305(a) (formerly Tex. Fam.Code § 3.26(a)).[2]

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[2] Section 6.305(a) provides:

If the petitioner . . . is a resident or a domiciliary of this state at the time the suit for dissolution is filed . . . the court may exercise personal jurisdiction over the respondent . . . although the respondent is not a resident of this state if:

(1) this state is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which the marital residence ended; or

A party may amend a special appearance. However, the party must not seek affirmative relief on any question other than that of the court's jurisdiction between the time it files its original special appearance and its amended special appearance. *See* Tex.R. Civ. P. 120a(2) (special appearance "shall be heard and determined before . . . any other plea or pleading may be heard."); *see also Liberty Enters.*, 690 S.W.2d at 571-72. Any intervening appearance to invoke the trial court's judgment about a "question other than the court's jurisdiction" is a general appearance. *See Moore v. Elektro-Mobil Technik GmbH*, 874 S.W.2d 324, 327 (Tex.App. — El Paso 1994, *writ denied*); *Investors Diversified Serv., Inc. v. Bruner*, 366 S.W.2d 810, 815 (Tex.Civ.App. — Houston 1963, *writ ref'd n.r.e.*).

B. ANALYSIS

Because Dawson-Austin's original special appearance was not sworn, it was defective. *See* Tex.R. Civ. P. 120a(1). While Rule 120a allows for amendment, any amendment to cure a defective special appearance must be accomplished before arguing other matters. *See* Tex.R. Civ. P. 120a(2). Dawson-Austin did not amend her special appearance until after she argued other matters, namely her motion to quash and about discovery related to that motion. By doing so, Dawson-Austin invoked the trial court's jurisdiction and generally appeared. *See* Tex.R. Civ. P. 120a(1) and (2); *see also Elektro-Mobil Technik GmbH*, 874 S.W.2d at 327; *Portland Sav. & Loan Ass'n*, 716 S.W.2d at 535.

Dawson-Austin argues that because she sought a continuance before the hearing on her original special appearance,

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(2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

Tex. Fam.Code § 6.305(a) (formerly Tex. Fam.Code § 3.26(a)).

she could present her other motions before amending her special appearance. I would reject this argument. I generally agree that a motion for continuance is not a general appearance. A continuance would allow a party to amend its special appearance under Rule 120a. A continuance request for that purpose in no way invokes the trial court's judgment about anything other than the court's jurisdiction. See *Elektro-Mobil Technik GmbH*, 874 S.W.2d at 327. However, that is not what occurred in this case. Dawson-Austin did not seek a continuance to cure her defective special appearance, but instead contended that she needed time to take depositions to support her motion to quash.[3] Regardless, Dawson-Austin did not provide the court of appeals with any briefing about whether the trial court improperly denied her a continuance. 920 S.W.2d at 782. She did not raise the issue in this Court.

Also, like the court of appeals, I reject Dawson-Austin's argument that she should be excused from arguing her motion to quash because Austin set the hearing. Dawson-Austin did not object to the trial court proceeding ***330** with her motion to quash or indicate to the trial court that she wanted to amend her special appearance before proceeding further. By arguing her motion to quash before amending her special appearance, Dawson-Austin committed a fatal procedural error and therefore generally appeared. *See Kawasaki Steel Corp.*, 699 S.W.2d at 201, 203. The Court should affirm the court of appeals.

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[3] Austin argues that although Rule 120a allows for a continuance for discovery, including depositions, the rule only allows for discovery about the disputed issue of personal jurisdiction. *See Portland Sav. & Loan*, 716 S.W.2d at 535; Tex.R. Civ. P. 120a(3). I agree. As a policy matter, litigants should not engage in discovery on the merits of other issues until the special appearance is decided.

III. DIVISIBLE DIVORCE

The Court compounds its error today by reversing the trial court's judgment except as to the grant of divorce. Where jurisdiction over the parties is established, Texas law does not allow a "divisible divorce." *See* Tex. Fam.Code § 7.001 (formerly Tex. Fam.Code § 3.63(a)) ("In a decree of divorce . . . the court shall order a division of the estate of the parties . . . ."); *see also Hollaway v. Hollaway,* 792 S.W.2d 168, 170 (Tex.App. — Houston [1st Dist.] 1990, *writ denied*); *Seibert v. Seibert,* 759 S.W.2d 768, 769-70 (Tex.App. — El Paso 1988, *writ denied*); *Vautrain v. Vautrain,* 646 S.W.2d 309, 314 (Tex.App. — Fort Worth 1983, *writ dism'd*). Here, because Dawson generally appeared, the trial court had jurisdiction over both parties. Therefore, it properly divided the marital estate.

Only recently, the Legislature codified the divisible divorce concept in cases where the court lacks jurisdiction over a nonresident party in a suit to dissolve a marriage. *See* Tex. Fam.Code § 6.308 (in a suit to dissolve a marriage, a court may exercise its jurisdiction "over those portions of the suit which it has authority.") (Added by Act of April 3, 1997, 75th Leg., R. S., ch. 7, § 1 and 4 (eff. April 17, 1997), 1997 Tex. Gen. Laws 8, 27, 43). Because of its effective date, section 6.308 does not apply to this case. *See* Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 4, 1997 Tex. Gen. Laws 8, 43 ("The change in law made by this Act does not affect a proceeding under the Family Code pending on the effective date of this Act. A proceeding on the effective date of this Act is governed by the law in effect at the time the proceeding was commenced, and the former law is continued in effect for that purpose."). Because of the prior existing Texas law, and because the trial court had jurisdiction over both parties, it had to divide the marital estate.

The Court cites *Estin v. Estin*, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948), for the proposition that the Supreme Court has recognized the concept of a "divisible divorce" and that it should apply here. *See Estin*, 334 U.S. at 549, 68 S.Ct. at 1218-19. In *Estin*, the wife initially sued for separation in New York. The husband answered, and the New York trial court granted a separation decree and awarded the wife permanent alimony. Two years later, after establishing residency in Nevada, the husband sued for divorce in Nevada. After constructive service (the wife was never personally served and never appeared), the Nevada court granted the husband a divorce. The Nevada divorce decree made no provision for alimony. The husband then stopped making alimony payments. When the wife tried to enforce the New York judgment, the husband argued that the Nevada divorce decree trumped the New York judgment. The New York court rejected his argument. The Supreme Court considered "whether Nevada could under any circumstances adjudicate rights of respondent [the wife] under the New York judgment when she was not personally served or did not appear in the [Nevada] proceeding." *Estin*, 334 U.S. at 547, 68 S.Ct. at 1217-18. The Supreme Court held that under full faith and credit principles, the Nevada court could not adjudicate the wife's rights under the New York judgment, "mak[ing] the divorce divisible . . . ." *Estin*, 334 U.S. at 549, 68 S.Ct. at 1218-19. Thus *Estin* stands for the proposition that, in a case where an out-of-state respondent is not personally served and does not appear, and thus there is no personal jurisdiction, any part of an ex parte divorce decree that purports to affect the respondent's property interests is not enforceable under full faith and credit principles. *See Estin*, 334 U.S. at 542, 68 S.Ct. at 1215; *see also Conlon v. Heckler*, 719 F.2d 788, 794-96 (5th Cir. 1983); *Fox v. Fox*, 559 S.W.2d 407, 410 (Tex.Civ.App. — Austin 1977, *no writ*); *Risch v. Risch*, 395 S.W.2d 709, 711 (Tex.Civ.App. — Houston 1965, *writ*

dism'd). *Estin*'s holding does not override section 7.001's command that "the ***331** court shall order a division of the estate of the parties," whenever the court has jurisdiction over the respondent under section 6.305(a). *See* Tex. Fam.Code § 6.305(a) (formerly Tex. Fam.Code § 3.26(a)); *see also Ismail v. Ismail,* 702 S.W.2d 216, 221 (Tex.App. — Houston [1st Dist.] 1985, *writ ref'd n.r.e.*); *Comisky v. Comisky,* 597 S.W.2d 6, 9 (Tex.Civ.App. — Beaumont 1980, *no writ*); *Butler v. Butler,* 577 S.W.2d 501, 507 (Tex.Civ.App. — Texarkana 1978, *writ dism'd*).

I agree with the Court that "the district court did not have *in personam* jurisdiction over Dawson-Austin unless it was under Section 6.305(a)(2) [of the Texas Family Code]." 968 S.W.2d at 326. Indeed, but for her procedural errors, Dawson-Austin may have been able to establish that the trial court did not have *in personam* jurisdiction over her under section 6.305(a)(2). However, Dawson-Austin's procedural errors resulted in a general appearance which satisfied section 6.305(a)(2)'s requirements. *See Kawasaki Steel Corp.,* 699 S.W.2d at 201, 203; *see also Burnham v. Superior Court,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (holding that due process clause did not prevent California courts from exercising jurisdiction over nonresident husband served with divorce suit while in California on business trip). Dawson-Austin's general appearance gave the trial court jurisdiction to dissolve the marriage and to divide the marital estate, as it was required to do. *See* Tex. Fam.Code § 7.001.

Because the trial court's jurisdiction was founded on Dawson-Austin's general appearance, the "divisibility" of the divorce turns on Texas law, which, when the court has jurisdiction over the parties, requires the court to divide the marital estate. *See* Tex. Fam.Code § 7.001; *Hollaway,* 792 S.W.2d at 170; *Vautrain,* 646 S.W.2d at 314. This case should

not be decided or "divided" on full faith and credit principles as in Estin.

IV. CONCLUSION

Today the Court permits less than strict compliance with Rule 120a. I believe that Dawson-Austin's efforts to specially appear were flawed. Therefore, she made a general appearance and the trial court properly exercised its jurisdiction. I would affirm the courts below. Because the Court holds otherwise, I dissent.

END OF DOCUMENT

IN THE SUPREME COURT OF TEXAS

No. 96-0442

CYNTHIA LEE DAWSON-AUSTIN, PETITIONER

v.

WILLIAM FRANKLIN AUSTIN, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the trial court for further proceedings in conformity with the opinion of this Court;

3) Cynthia Lee Dawson-Austin shall recover from William Franklin Austin, who shall pay the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District and to the District Court of Dallas County, Texas, for observance.

(Opinion by Justice Hecht, joined by Chief Justice Phillips, Justice Gonzalez, Justice Owen, Justice Spector, and Justice Hankinson)

(Dissenting opinion by Justice Baker, joined by Justice Enoch and Justice Abbott)

February 13, 1998

****

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
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July 3, 1998

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RE: Case Number 96-0442
Court of Appeals Number: 05-94-00056-CV
Trial Court Number: 92-14835-T

Style: CYNTHIA LEE DAWSON-AUSTIN v.
WILLIAM FRANKLIN AUSTIN

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ COURTLAND CROCKER
Courtland Crocker
Deputy

ITEM 7

U.S. CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

267 Ga. 815

ABERNATHY, a/k/a Denny

v.

ABERNATHY.

No. S96A1770.

Supreme Court of Georgia.

March 3, 1997.

Reconsideration Denied April 4, 1997.

Husband brought divorce action against nonresident wife requesting that he be awarded a total divorce and that property located in Georgia be awarded to him. The Superior Court, Muscogee County, Douglas C. Pullen, J., concluded it had jurisdiction over res of marriage relationship and in rem jurisdiction with respect to property located in state, and certified its order for immediate review. Wife's application for interlocutory appeal was granted. The Supreme Court, Carley, J., held that trial court had in rem jurisdiction over divorce action.

Affirmed.

Fletcher, P.J., Filed a dissenting opinion in which Sears, J., joined.

Sears, J., filed a dissenting opinion in which Fletcher, P.J., joined.

1. Divorce Key 62(5), 65

Personal jurisdiction over defendant is not a prerequisite to grant of divorce by Georgia court; rather, party seeking divorce need only show that trial court has jurisdiction over res of marriage which results from his or her domicile in state

for six-month period preceding filing of action. O.C.G.A. § 19-5-2.

2. Divorce Key 65

Long-arm statute, which only applies in cases in which personal jurisdiction over nonresident defendant is required, did not apply to divorce action in which wife was a nonresident, as personal jurisdiction over defendant was not a prerequisite to grant of divorce by a Georgia court. O.C.G.A. §§ 9-10-91, 19-5-2.

3. Divorce Key 79

Trial court had jurisdiction to grant divorce based on service by publication.

4. Divorce Key 201

Trial court with jurisdiction to grant divorce cannot award either alimony or attorney fees unless it also has personal jurisdiction over defendant.

5. Divorce Key 201

Lack of personal jurisdiction over nonresident defendant did not prevent trial court from entering judgments in rem in divorce action with respect to res of property within its territory.

6. Courts Key 12(2.5)

Assertions of state-court jurisdiction, whether in rem or in personam, must satisfy minimum contacts standard. U.S.C.A. Const.Amend. 14.

7. Courts Key 12(2.5)

Mere presence of property in state, standing alone, will not constitute sufficient minimum contacts to support state's exercise of its in rem jurisdiction if property is unrelated to underlying cause of action.

8. Divorce Key 201

Georgia court had full in rem jurisdiction over divorce action involving nonresident defendant where only property at issue was marital property situated in Georgia and nonresident spouse claimed interest therein so that Georgia property was the very subject of the litigation.

9. Courts Key 17

When service by publication is used not merely to compel presence of nonresident defendant or for some other purpose extraneous to litigation, but to adjudicate rights in very property upon which in rem jurisdiction is based, the minimum contacts test for in rem jurisdiction is met.

John P. Partin, Hirsch, Partin, Grogan & Grogan, P.C., Columbus, for Elizabeth Susan Denny.

Leslie L. Cohn, Cohn & Cohn, Columbus, for John Michael Abernathy.

Joseph T. Tuggle, Jr., McCarny, Phillips, Tuggle & Fordham, Dalton, Kutner & Bloom, Jean Miller Kutner, Atlanta, amici curiae.

CARLEY, Justice.

Elizabeth Susan Denny and John Michael Abernathy were married in Florida and resided in Louisiana until their separation. Thereafter, Mr. Abernathy moved to Georgia and, about a year later, he brought this divorce action against

Ms. Denny. In his complaint, Mr. Abernathy requested only that he be awarded a total divorce from Ms. Denny and that the property located in Georgia be awarded to him. After Ms. Denny filed an answer raising the defense of lack of personal jurisdiction, Mr. Abernathy filed a "motion to determine jurisdiction and/or dismiss defenses of special appearing defendant." The trial court, Douglas C. Pullen, J., conducted a hearing on Mr. Abernathy's motion and concluded that it had "jurisdiction over the res of the marriage relationship" and "in rem jurisdiction with respect to [the] property located within this State." The trial court certified its order for immediate review and we granted Ms. Denny's application for an interlocutory appeal.

Ms. Denny insists that the trial court erred in ruling that it has personal jurisdiction over her. However, the trial court never ruled that it has *personal* jurisdiction over Ms. Denny. Instead, the trial court ruled only that it has jurisdiction over the res of the marriage so as to determine the issue of divorce and in rem jurisdiction over the marital property located in this state so as to determine the issue of the division of that property. Accordingly, if the trial court has jurisdiction over the marriage and the marital property in Georgia, the order was correct without regard to the trial court's lack of personal jurisdiction over Ms. Denny herself.

[1] Personal jurisdiction over the defendant is not a prerequisite to the grant of a divorce by a Georgia court. *Charamond v. Charamond*, 240 Ga. 34, 35(2), 239 S.E.2d 362 (1977). The party seeking a divorce need show only that the trial court has jurisdiction over the res of the marriage which results from his or her domicile in this state for the six-month period preceding the filing of the action. OCGA § 19-5-2;

Charamond v. Charamond, supra; *Abou-Issa v. Abou-Issa,* 229 Ga. 77-78, 189 S.E.2d 443 (1972).

> [E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.

Williams v. North Carolina, 317 U.S. 287, 298-299, 63 S.Ct. 207, 213, 87 L.Ed. 279 (1942); *Page v. Page* 255 Ga. 145, 146(1)(a), 335 S.E.2d 865 (1985). "[T]he divorce granted one spouse in one state will bind the other spouse in his or her domicile if the requirements of procedural due process are met." *Page v. Page,* supra at 146(1)(a), 335 S.E.2d 865.

[2,3] Accordingly, any reliance upon the Long Arm Statute in this case is erroneous because that statute deals only with the exercise of *personal* jurisdiction over nonresidents. OCGA § 9-10-91. The Long Arm Statute does not apply in every case in which the defendant is a nonresident. It applies only in cases in which personal jurisdiction over the nonresident defendant is required. Accordingly compliance with the Long Arm Statute would be mandated in this case if the trial court's personal jurisdiction over Ms. Denny was necessary to its adjudication of Mr. Abernathy's claims against her. However, the trial court was not required to have personal jurisdiction over Ms. Denny in order to adjudicate Mr. Abernathy's claim for divorce. After Mr. Abernathy obtained proper service by publication, the clerk of the trial court mailed a copy of the published notice to Ms. Denny. Ms. Denny had actual notice of the pendency of the divorce action and, indeed, made a special appearance to contest personal jurisdiction. In these circumstances, the trial court clearly has jurisdiction to grant a divorce based on service by publication. *Albers v. Albers,* 238 Ga. 590, 591(1), 234 S.E.2d 507 (1977). *See also Chafin v. Burroughs,* 224 Ga. 774, 164 S.E.2d 826 (1968);

Marbury v. Marbury, 256 Ga. 651, 652(1), 352 S.E.2d 564 (1987).

[4, 5] It is certainly true that a trial court with jurisdiction to grant a divorce cannot award either alimony or attorney's fees unless it also has personal jurisdiction over the defendant. *Anthony v. Anthony,* 237 Ga. 753, 754, 229 S.E.2d 609 (1976); *Hammers v. Hammers,* 230 Ga. 711, 198 S.E.2d 656 (1973); *Hicks v. Hicks,* 193 Ga. 446(1), 18 S.E.2d 754 (1942). The award of such monetary judgments must be predicated upon the trial court's personal jurisdiction over the defendant. Here, however, the trial court awarded neither alimony nor attorney's fees. In addition to a divorce from Ms. Denny, Mr. Abernathy prayed only for a division of the marital property located in Georgia. A lack of personal jurisdiction does not prevent the trial court from entering certain other judgments in rem. Personal jurisdiction in Georgia may be required in order to obtain a judgment which will personally bind a nonresident defendant as to marital property located in another forum. *See* OCGA § 9-10-91(5). However, notwithstanding a lack of personal jurisdiction over the defendant in a divorce case, a trial court can render a valid judgment in rem with respect to the res of the property within its territory. *Albers v. Albers,* supra at 592(3), 234 S.E.2d 507; *Anthony v. Anthony,* supra at 754, 229 S.E.2d 609; *Grimmett v. Barnwell,* 184 Ga. 461, 478(2), 192 S.E. 191 (1937). Mr. Abernathy does not seek a division of marital property which is located in Louisiana or any state other than Georgia. It follows that the trial court not only has jurisdiction to grant Mr. Abernathy a divorce, it also has in rem jurisdiction to determine the respective interests of Mr. Abernathy and Ms. Denny in any marital property located in this state.

[6] It is urged that *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) has changed the above-stated legal principles. However, *Shaffer* did not hold that it is

unconstitutional for a state court to exercise its in rem jurisdiction and that only a state court's exercise of its personal jurisdiction is constitutional. All that *Shaffer*, supra at 212, 97 S.Ct. at 2584, holds is that assertions of state-court jurisdiction, whether in rem or in personam, must satisfy the "minimum contacts" standard. As *Shaffer*, supra at 208, 97 S.Ct. at 2582, itself clearly pointed out,

> jurisdiction over many types of actions which now are or might be brought in rem would *not* be affected by a holding that any assertion of state-court jurisdiction must satisfy the ["minimum contacts"] standard.

(Emphasis supplied). *Shaffer v. Heitner*, supra at 208, 97 S.Ct. at 2582. Accordingly, Mr. Abernathy's divorce action does not violate applicable constitutional mandates if the "minimum contacts" standard for an in rem action is satisfied, without regard to Ms. Denny's own personal lack of direct contact with Georgia.

[7-9] The limited holding of *Shaffer*, supra at 208-209, 97 S.Ct. at 2581-2582, is that the mere presence of property in a state, standing alone, will not constitute sufficient "minimum contacts" to support the state's exercise of its in rem jurisdiction, *if* the property is unrelated to the underlying cause of action. Thus, the "minimum contacts" standard does not foreclose the exercise of state-court jurisdiction over a true in rem action or a case wherein the plaintiff " 'is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons,' " or "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant." *Shaffer v. Heitner*, supra at 199 fn. 17, 207, 97 S.Ct. at 2577 fn. 17, 2581. Obviously, a dispute between divorcing resident and non-resident parties as to marital property located in Georgia would constitute such a claim. In such a case, there is more than the mere presence of

property to support the in rem jurisdiction of a Georgia court to determine the dispute.

> [T]he defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.

Shaffer v. Heitner, supra at 207-208, 97 S.Ct. at 2581-2582. When service by publication is used not merely to compel the presence of the defendant or for some other purpose extraneous to the litigation, but to adjudicate rights in the very property upon which in rem jurisdiction is based, the "minimum contacts" test is met. *Shaffer v. Heitner,* supra; *Chenoweth v. Chenoweth,* 575 S.W.2d 871, 873 (Mo.App.1978); *In re Marriage of Breen,* 560 S.W.2d 358, 363 (Mo.App.1977). Therefore, where, as here, the only property at issue in a Georgia divorce action is such marital property as is situated in Georgia and the nonresident spouse claims an interest therein, the Georgia property is the very subject of the litigation, and a Georgia court has full in rem jurisdiction which has not been substantively changed by *Shaffer. Chenoweth v. Chenoweth,* supra at 874. It is only that in rem jurisdiction which Mr. Abernathy invoked and the trial court exercised in this case.

If the trial court in a divorce case could not exercise such in rem jurisdiction, then a resident of Georgia who possesses marital property here could not obtain a divorce and a disposition of that property from the courts of this state unless, at some time, the other party has resided in Georgia. If the trial court in the instant case could not exercise in rem

jurisdiction, then, although Mr. Abernathy has been a resident of Georgia for more than six months and owns property in this state, only the courts of Louisiana would be able to dissolve his marriage and make a disposition of his Georgia property. Those who reside in Georgia for at least six months are entitled to access to the courts of their own state for the purpose of dissolving their marriages and dividing any marital property actually located here. The trial court correctly concluded that it has jurisdiction over the parties' marital relationship and the disposition of property situated in Georgia. Mr. Abernathy need not resort to the Long Arm Statute unless and until he seeks some form of relief, such as alimony or attorney's fees or division of non-Georgia marital property, which requires personal jurisdiction over Ms. Denny herself.

Judgement affirmed.

All the Justices concur, except FLETCHER, P.J., and SEARS, J., who dissent.

FLETCHER, Presiding Justice, dissenting.

I concur fully in Justice Sears' dissent. I write separately to emphasize the inherent unfairness in the approach taken by the majority. The majority's opinion opens the doors of Georgia's courts to any citizen of this country who wants to divorce and to obtain an unfair advantage over his or her spouse in the division of marital property. All any citizen need do is leave his or her marital home, take any or all assets of the couple, move to Georgia and file for divorce in six months. The non-resident spouse is then forced to litigate his or her claim to those marital assets in a foreign jurisdiction. The United States Supreme Court seemed to foreclose such unfairness in the divorce context a generation ago by refusing

to allow easily obtained Nevada divorces to cut off property rights of nonresident spouses.[1]

Additionally, twenty years ago in *Shaffer v. Heitner*[2] the United States Supreme Court emphasized the importance of "fairness" in all exercises of state court jurisdiction. In *Shaffer*, the Court held that "quasi in rem" jurisdiction must be treated like "in personam" jurisdiction and subjected to the "minimum contacts" analysis of *International Shoe*[3] and its progeny.[4] Here, husband seeks to adjudicate only his and his wife's interests in real and personal marital property in Georgia. Thus, any judgment would be "quasi in rem" because it seeks to "secure [his] pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of [his wife]."[5] Husband does not seek an "in rem" judgment against property in Georgia. "In rem" jurisdiction, such as a quiet title action against all the world, exists to determine "the interests of all persons in designated property."[6] Because this is a "quasi in rem" case, the court must have personal jurisdiction over both parties to adjudicate their interests in the property.

The wife lacks any semblance of minimum contacts with this state: she has never lived here and she did not participate in the decision of her husband to acquire property in this

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[1] See *Estin v. Estin*, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456 (1957).

[2] 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

[3] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

[4] 433 U.S. at 212, 97 S.Ct. at 2584.

[5] *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12, 78 S.Ct. 1228, 1235 n. 12, 2 L.Ed.2d 1283 (1958).

[6] *Id.*

state.[7] Therefore, the courts of this state are not authorized to exercise jurisdiction over her to determine her interests in marital property, real and personal, that her husband happened to bring with him from Louisiana or purchase once he arrived in Georgia. Forcing the wife to litigate her interests in marital assets wherever her husband happens to relocate violates "traditional notions of fair play and substantial justice."[8] Therefore, I strongly dissent.

I am authorized to state that Justice SEARS joins in this dissent.

SEARS, Justice, dissenting.

In ruling that the trial court properly exercised jurisdiction in this case, the majority demonstrate fundamental misunderstandings of our domestic relations long-arm statute[9] and of the minimum contacts test set forth by the United States Supreme Court in *Shaffer v. Heitner*.[10] For the reasons that follow, I would hold that OCGA § 9-10-91(5) and the minimum contacts test preclude the exercise of jurisdiction by the trial court in this case.

1. The majority reasons that compliance with OCGA § 9-10-91(5) is unnecessary in this case because it only applies to the exercise of personal jurisdiction and because

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[7] Compare *Williams v. Williams*, 121 N.H. 728, 433 A.2d 1316 (1981) (New Hampshire court had personal jurisdiction over non-resident wife where husband and wife jointly built house in New Hampshire and wife spent several months of every year for eight years with husband in New Hampshire); *Hann v. Hann*, 175 N.J.Super 608, 421 A.2d 607 (1980) (personal jurisdiction over non-resident husband where parties jointly built two houses in New Jersey during marriage and since separation, husband had traveled to New Jersey to check on wife and threaten her).

[8] *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158.

[9] OCGA § 9-10-91(5).

[10] *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

Mr. Abernathy's claims for divorce and division of the parties' property only invoke principles of in rem jurisdiction. The majority, however, overlooks the simple proposition that the legislature in enacting § 9-10-91(5) chose to require personal jurisdiction to litigate the claims asserted by Mr. Abernathy in this case.

Conspicuously absent from the majority opinion is any mention of the language of § 9-10-91(5). OCGA § 9-10-91 provides, in relevant part, that

> [a] court of this state may exercise *personal jurisdiction* over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
>
> . . . .
>
> (5) With respect to proceedings for alimony, child support, *or division of property in connection with an action for divorce* or with respect to an independent action for support of dependents, *maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action*, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

(Emphasis supplied.)

Thus, the statute plainly addresses actions for "division of property in connection with an action for divorce" and provides that a trial court "may exercise personal jurisdiction over any nonresident" in such an action if the cause of action

arises from the maintenance of "a matrimonial domicile in this state at the time of the commencement of this action" or from the residence of the "the defendant . . . in this state preceding the commencement of the action, whether cohabiting during that time or not."[11] Further, given the broad, expansive language of "proceedings" for "division of property in connection with an action for divorce," and given that property division in divorce cases typically involves property located in this state, the only reasonable construction of § 9-10-91(5) is that the General Assembly intended it to govern divorce cases involving the division of property located within this state. Moreover, if the General Assembly had intended for this language only to apply to the division of property located outside of this state, it easily could have, and presumably would have, added language to that effect. Finally, by providing requirements for how a trial court may exercise personal jurisdiction in divorce and property division cases, the General Assembly clearly intended for personal jurisdiction to be a requisite for a Georgia court to exercise jurisdiction in those cases. Otherwise, the statute need not have contained language regarding divorce and property division cases, and the inclusion of those cases within the scope of § 9-10-91(5) would be completely meaningless.

Further, it is beyond dispute that the General Assembly has the power to require personal jurisdiction in cases of divorce and division of property located in this state if it so desired and to set forth the type of contacts necessary to exercise that jurisdiction. Other courts have moved in this direction,[12] and I believe our legislature did so in adopting § 9-10-91(5).

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[11] *Id.*

[12] *Villarroel v. Villarroel*, 562 A.2d 1180(2) (Del. 1989); *Mock v. Mock*, 11 Va.App. 616, 400 S.E.2d 543, 544-45 (1991); *Smith v. Smith*, 459 N.W.2d 785, 787-89 (N.D. 1990).

Moreover, the phrase "personal jurisdiction" does not mean, as the majority concludes, that the General Assembly did not intend § 9-10-91(5) to apply to what have been regarded as in rem cases. First, as I have explained, it is contrary to the statute's clear intent. Second, before paragraph (5) of § 9-10-91 was adopted a blurring of the Latin labels in personam and in rem was occurring, as was a blurring of the requirements for exercising in personam and in rem jurisdiction. For instance, in *Shaffer,* the Supreme Court stated that "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification,"[13] and concluded that in rem jurisdiction had to be justified based upon the minimum contacts test set forth for in personam jurisdiction in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).[14] Furthermore, since *Shaffer,* the Supreme Court has confirmed the melding of the labels of in personam and in rem jurisdictions. In *Burnham v. Superior Court of California,* Justice Scalia wrote the following regarding *Shaffer:*

> *Shaffer* was saying . . . that *quasi in rem* jurisdiction, that fictional "ancient form," and *in personam,* jurisdiction, are really one and the same and must be treated alike — leading to the conclusion that *quasi in rem* jurisdiction, *i.e.,* that form of *in personam* jurisdiction based upon a "property ownership" contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe.* The logic of *Shaffer's* holding . . . places all suits against absent nonresidents on the same

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[13] *Shaffer,* 433 U.S. at 212, 97 S.Ct. at 2584.

[14] *Id.* at 207, 212, 97 S.Ct. at 2581, 2584.

constitutional footing, regardless of whether a separate Latin label is attached.[15]

Against this backdrop, it is reasonable for the General Assembly to have set forth the minimum contacts necessary for a court of this state to exercise jurisdiction over a nonresident in divorce and property division cases when the property to be divided was located in this state, and to have used the label of "personal jurisdiction."

With its opinion today, the majority of this Court effectively strikes the language "or division of property in connection with an action for divorce" from § 9-10-91(5) and, in doing so, tells the General Assembly that it acted uselessly and unnecessarily in adopting rules to govern jurisdiction in such actions. This obliteration of statutory language is unacceptable to me, and contrary to all rules of statutory construction.

Moreover, this Court has previously given § 9-10-91(5) the construction that I advance in this dissent. In *Heath v. Heath,*[16] involving, among other things, a claim for division of property located within this state, this Court held as follows:

> If a foreign court has *in personam jurisdiction* over the defendant, it may adjudicate *property rights such as* alimony, child support, and *title to real property. Whitaker v. Whitaker,* 237 Ga. 895, 230 S.E.2d 486 (1976). Such a right is *afforded by our domestic long-arm statute under* OCGA § 9-10-91(5) provided the defendant has had sufficient minimum contacts with the state. From the record it appears that because of husband's contacts with the state and wife's residency the Georgia court has in

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[15] 495 U.S. 604, 621, 110 S.Ct. 2105, 2116, 109 L.Ed.2d 631 (1990).

[16] 257 Ga. 777, 778, 364 S.E.2d 272 (1988).

personam jurisdiction over both parties and may decide their property rights."[17]

Additionally, in *Kemp v. Sharp*,[18] we have stated that " 'Georgia's domestic-relations long arm statute' (*Braden v. Braden*, 260 Ga. 269, 270, 392 S.E.2d 710 (1990)), ... applies by its own terms only to actions involving alimony, child support, and division of property. The action brought by Kemp against Sharp involved none of those matters." The clear implication of the foregoing is that if the action brought by Kemp had involved any one "of those matters," *i.e.*, alimony, child support, or division of property, the long-arm statute would have been applicable. Significantly, in commenting on the scope of § 9-10-91(5) in *Kemp*, we did not state that it applies "only to actions involving ... division of property [located outside this state.]"

Instead of eviscerating § 9-10-91(5), I would apply its terms to Mr. Abernathy's action for divorce and division of property. Because Ms. Denny did not maintain a "matrimonial domicile" in Georgia at the time Mr. Abernathy filed his complaint and because she did not reside in Georgia before the action was filed, I would hold that the trial court erred in exercising jurisdiction, and I would reverse the trial court's denial of her motion to dismiss.[19]

2. Further, even assuming that § 9-10-91(5) is inapplicable to this case, the trial court nevertheless erred in exercising jurisdiction in that doing so violates fundamental notions of fair play and substantial justice and does not meet the

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[17] *Id.* at 778, 364 S.E.2d 272 (Emphasis supplied.)

[18] 261 Ga. 600, 409 S.E.2d 204 (1991).

[19] See *Frasca v. Frasca*, 254 Ga. 532, 535(3), 330 S.E.2d 889 (1985); Lanier, *Connecting Defendant's Contact and Plaintiff's Claim: The Doctrine of Specific Jurisdiction and the Matrimonial Domicile Provisions of the Georgia Long-Arm Statute*, 11 Ga. St. U.L.Rev. 303 (1995).

minimum contacts test established by the United States Supreme Court.

Although the majority correctly states that *Shaffer v. Heitner* does not preclude the exercise of jurisdiction over actions in rem, the majority fails to give any meaningful analysis of whether minimum contacts were satisfied in this case. Instead, the majority focuses on the following quote from *Shaffer:*

> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.[20]

Relying on this example, the majority in this case reduces the minimum contacts test for cases involving the division of property located in this state to one factor — whether the property is related to the litigation. This reductionist approach, however, is contrary to the Supreme Court's decision in *Shaffer* and other cases. In *Shaffer*, referring to the foregoing illustration, the Supreme Court stated that it did not include all of the factors that would satisfy the minimum contacts test and that the factors the Court mentioned were not "necessarily decisive."[21] Further, in a footnote, the Court stated that "[i]n some circumstances the presence of property in the forum [s]tate will not support the inference suggested in

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[20] *Shaffer*, 433 U.S. at 207, 97 S.Ct. at 2581 (footnotes omitted).

[21] *Shaffer*, 433 U.S. at 208-09 n. 28, 97 S.Ct. at 2581-82 n. 28.

text [*i.e.*, that the exercise of jurisdiction is appropriate when the property is located in a state and is related to the litigation]; Cf., *e.g.*, RESTATEMENT [(SECOND) OF CONFLICT OF LAWS] § 60, Comments c, d."[22] In this regard, Comment c of the RESTATEMENT § 60 provides that "[a] state will not usually exercise judicial jurisdiction to affect interest in a chattel brought into its territory without the consent of the owner unless and until the owner has had a reasonable opportunity to remove the chattel." The Court in *Shaffer* also cautioned that the minimum contacts test is one of reasonableness and is not subject to mechanical application.[23] Thus, contrary to the majority opinion, the Supreme Court did not hold that the fact that property is related to a cause of action dictates a holding that the minimum contacts test is satisfied. Finally, the Supreme Court emphasized in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[24]

Although the majority does not evaluate the exercise of jurisdiction in this case pursuant to those standards, I will do so. Under *International Shoe*[25] and its progeny, a defendant must " 'have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "tradi-

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[22] *Id.* at 208 n. 25, 97 S.Ct. at 2581 n. 25.

[23] *Shaffer*, 433 U.S. at 203-04, 206-08, 97 S.Ct. at 2579, 2581. In *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696-97, 56 L.Ed.2d 132 (1978), the Court stated that "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. *Hanson v. Denckla*, 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed.2d 1283 (1958)."

[24] *Shaffer*, 433 U.S. at 212, 97 S.Ct. at 2584.

[25] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

tional notions of fair play and substantial justice." ' "[26] Further,

> the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. *International Shoe Co. v. Washington, supra,* at 316, 66 S.Ct. at 158 .... "Critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." [*World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 561, 62 L.Ed.2d 490 (1980).] In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson v. Denckla,* 357 U.S. 235, 253 78 S.Ct. 1228, 1239-1240, 2 L.Ed.2d 1283 (1958):
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> > "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, *Keeton v. Hustler Magazine, Inc.,* 465 U.S. [770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984)]; *World-Wide Volks-*

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[26] *Kulko v. Superior Court of California,* 436 U.S. at 92, 98 S.Ct. at 1696-97, quoting *International Shoe,* 326 U.S. at 316, 66 S.Ct. at 158.

wagen Corp. v. Woodson, supra, 444 U.S. at 299, 100 S.Ct., at 568 or of the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* [466 U.S. 408, 417, 104 S.Ct. 1868, 1873-74, 80 L.Ed.2d 404 (1984)].[27]

Similarly, this Court has held that

> [d]ue process requires that individuals have "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). In evaluating whether a defendant could reasonably expect to be haled into court in a particular forum, courts examine defendant's contacts with the state, focusing on whether (1) defendant has done some act to avail himself of the law of the forum state; (2) the claim is related to those acts; and (3) the exercise of jurisdiction is reasonable, that is, it does not violate notions of fair play and substantial justice. *Straus v. Straus,* 260 Ga. 327, 393 S.E.2d 248 (1990); *Smith v. Smith,* 254 Ga. 450, 330 S.E.2d 706 (1985).[28]

Clearly, then, a significant factor in considering whether the dictates of *Shaffer v. Heitner* are satisfied in this case is whether Ms. Denny has purposefully availed herself of the benefits and protections of the State of Georgia. The answer: She has not. She was not married here, has never lived here, has never brought property into this State, and has never bought property in this State. She simply has done no act to avail herself of the benefits and protections of this State. Rather, it is the unilateral action of Mr. Abernathy in moving

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[27] *Burger King v. Rudzewicz,* 471 U.S. 462, 474-75, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985).

[28] *Beasley v. Beasley,* 260 Ga. 419, 421, 396 S.E.2d 222 (1990).

to Georgia and purchasing property here that has created a connection with the State of Georgia. Under the foregoing authority, the unilateral actions of Mr. Abernathy are insufficient to satisfy the minimum contacts test.

Further, basic considerations of fairness dictate that Georgia is not the proper forum for resolving Mr. Abernathy's claim. Ms. Denny has never availed herself of Georgia and has at all times remained in Louisiana, the state of matrimonial domicile. Mr. Abernathy, on the other hand, left that State and moved to Georgia, purchasing real property here after the separation. Under these circumstances, it would be unfair to Ms. Denny to impose upon her the financial and personal difficulties of litigating in Georgia.[29] Further, in *Burger King*, the Supreme Court stated that a factor to consider in determining whether the exercise of jurisdiction "comport[s] with 'fair play and substantial justice' " is the " 'interstate judicial system's interest in obtaining the most efficient resolution of controversies.' "[30] In cases such as the present one, where there is another state (Louisiana) that can resolve the parties' entire controversy, the majority opinion will foster the inefficient resolution of divorce issues, with, in many cases, this state resolving property division issues regarding property located in this state, and the other state resolving alimony, child support, and property division issues regarding property located in that state. Moreover, considering the close connection between property division issues and alimony and child support issues,[31] this is an ineffective method to resolve the bundle of issues that can arise from a divorce.

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[29] *See Kulko*, 436 U.S. at 97-98, 98 S.Ct. at 1699-1700 (the Supreme Court held that considerations of fairness would be violated if husband, who continued to live in the state of matrimonial domicile (New York), had to litigate child support in California, the state to which the wife had moved).

[30] *Burger King*, 471 U.S. at 476-77, 105 S.Ct. at 2184.

[31] *Stokes v. Stokes*, 246 Ga. 765, 772-73, 273 S.E.2d 169 (1980).

Instead of evaluating Ms. Denny's contacts with Georgia under *International Shoe* and its progeny, the majority simply concludes that the location of the disputed property here is a sufficient minimum contact. For the reasons given above, this analysis is misguided. Moreover, the majority relies on two Missouri cases for this proposition.[32] *Chenoweth,* however, followed the seminal Missouri case of *In re Marriage of Breen,* and *Breen* correctly recognized that the "perennial rules of due process for judgments in rem and quasi in rem *have been reordered* by the United States Supreme Court very recently in *Shaffer v. Heitner,*" and had been replaced by the minimum contacts analysis set forth in *International Shoe.*[33] Significantly, in ruling that the trial court could exercise jurisdiction based upon a minimum contacts analysis, the court in *Breen* considered it critical that the parties, including the nonresident, had purchased real estate in Missouri.

> The acquisition of the real estate within Missouri by the marriage was a purposeful avail by the spouses of the protection by this sovereignty of their interests in the property. It was a conscious assumption of risk that the State would exercise its power over their property interests, and certainly would adjust their disputes over ownership should the marriage dissolve. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958).[34]

The present case stands in stark contrast to *Breen.* Here, as has been previously outlined in this dissent, Ms. Denny has not purposefully availed herself of Georgia sovereignty by purchasing property in this state or otherwise.

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[32] *Chenoweth v. Chenoweth,* 575 S.W.2d 871 (Mo.App.1978). *In re Marriage of Breen,* 560 S.W.2d 358 (Mo.App.1977).

[33] *Breen,* 560 S.W.2d at 362.

[34] *Breen* at 363.

Significantly, the majority opinion conflicts with the holdings of other courts and the analysis of commentators. In this regard, these courts and commentators reason that where one spouse takes marital property to another state and files for divorce in that state, that state cannot exercise jurisdiction over the nonresident spouse because the nonresident spouse has not purposefully availed herself of the benefits and protections of the laws of the state where the property is located.[35]

For the foregoing reasons, I would hold in this case that the trial court's exercise of jurisdiction is inconsistent with the constitutional limitations discussed above.

3. Because the majority misconstrues § 9-10-91(5), as well as the minimum contacts test, and because a proper analysis of § 9-10-91(5) and the minimum contacts test mandate the reversal of the trial court's exercise of jurisdiction, I dissent to the majority opinion.

I am authorized to state that Presiding Justice FLETCHER joins in this dissent.

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[35] Oldham, *Conflict of Laws and Marital Property Rights*, 39 Baylor L.Rev. 1255, 1264-65 (1987); *Carroll v. Carroll*, 88 N.C.App. 453, 363 S.E.2d 872, 873-75 (1988); *Shamley v. Shamley*, 117 N.C.App. 175, 455 S.E.2d 435, 437-39 (1994); *Smith v. Smith*, 459 N.W.2d 785 (N.D.1990).